

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF  
TEXAS, DALLAS DIVISION**

**In Re:** Highland Capital Management, L.P. § Case No. 19-34054-SGJ-11

Highland Capital Management Fund Advisors, L.P.

et al §

Appellant §

vs. §

Highland Capital Management, L.P., § 3:21-CV-00538-N

Appellee §

**[1943] Order confirming the fifth amended chapter 11 plan, Entered on 2/22/2021.**

**APPELLANT RECORD  
VOLUME 7**

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ATTORNEYS FOR HIGHLAND CAPITAL  
MANAGEMENT FUND ADVISORS, L.P. AND  
NEXPOINT ADVISORS, L.P.

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

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In re:	)	Chapter 11
	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.	)	Case No. 19-34054 (SGJ11)
	)	
Debtor.	)	
	)	

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**AMENDED DESIGNATION BY NEXPOINT ADVISORS, L.P. AND HIGHLAND  
CAPITAL MANAGEMENT FUND ADVISORS, L.P.  
OF ITEMS FOR THE RECORD ON APPEAL**

COME NOW Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (the “Appellants”), creditors and parties-in-interest in the above styled and numbered bankruptcy case (the “Bankruptcy Case”) of Highland Capital Management, L.P. (the “Debtor”), and, with respect to their *Notice of Appeal* [docket no. 1957], hereby file their *Amended Designation of Items for the Record on Appeal* (the “Designation”) as follows:

<u>Item</u>	<u>Bankruptcy Docket Number</u>	<u>Description</u>
<b>Pleadings and Items on Docket</b>		
1	1957	Notice of Appeal
2	1943	Order (i) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief
3		Docket Sheet of Bankruptcy Case No. 19-34054
4	1606	Debtor's Notice of Filing of Plan Supplement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.
5	1648	Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith
6	1656	Debtor's Notice of Filing of Plan Supplement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.
7	1670	Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.
8	1719	Second Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith
9	1749	Third Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith
10	1772	Certification of Patrick M. Leathem With Respect to the Tabulation of Votes on the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.
11	1791	Notice of Withdrawal of Certain Executory Contracts and Unexpired Leases from List of Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan
12	1807	Debtor's Omnibus Reply to Objections to Confirmation of the Fifth Amended Chapter 11 Plan of Reorganization of Highland Capital Management
13	1808	Debtor's Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)
14	1811	Notice of Filing Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (with Technical Modifications)
15	1814	Debtor's Memorandum of Law in Support of Confirmation of the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.

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<i>001414</i>	17	1873	Fifth Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith
<i>001421</i>	18	1875	Debtor's Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland of Highland Capital Management, L.P. (As Modified)
<i>001427</i>	19	1887	Supplemental Certification of Patrick M. Leathem With Respect to the Tabulation of Votes on the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.
<i>001475</i>	20	1671	United States Trustee's Limited Objection to Confirmation of Debtors' Fifth Amended Plan of Reorganization
<b><u>Evidence and Transcripts</u></b>			
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<i>001783</i>	22	1905	Transcript of February 3, 2021 Confirmation Hearing
<i>002040</i>	23	1917	Transcript of February 8, 2021 Bench Ruling
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RESPECTFULLY SUBMITTED this 22d day of March, 2021.

**MUNSCH HARDT KOPF & HARR, P.C.**

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on this the 22d day of March, 2021, true and correct copies of this document were electronically served by the Court's ECF system on parties entitled to notice thereof, including on counsel for the Debtor.

By: /s/ Davor Rukavina

Davor Rukavina, Esq.

1 IN THE UNITED STATES BANKRUPTCY COURT  
2 FOR THE NORTHERN DISTRICT OF TEXAS  
3 DALLAS DIVISION

4 In Re: ) **Case No. 19-34054-sgj-11**  
5 HIGHLAND CAPITAL ) Chapter 11  
6 MANAGEMENT, L.P., )  
7 Debtor. ) Dallas, Texas  
8 ) Wednesday, February 3, 2021  
9 ) 9:30 a.m. Docket  
10 ) CONFIRMATION HEARING [1808]  
11 ) AGREED MOTION TO ASSUME [1624]  
12 )  
13 ) *Continued from 02/02/2021*  
14 )  
15 )  
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9 TRANSCRIPT OF PROCEEDINGS  
10 BEFORE THE HONORABLE STACEY G.C. JERNIGAN,  
11 UNITED STATES BANKRUPTCY JUDGE.

12 WEBEX APPEARANCES:

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Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

1                   DALLAS, TEXAS - FEBRUARY 3, 2021 - 9:38 A.M.

2                   THE CLERK: All rise. The United States Bankruptcy  
3 Court for the Northern District of Texas, Dallas Division, is  
4 now in session, the Honorable Stacey Jernigan presiding.

5                   THE COURT: Good morning. Please be seated. All  
6 right. We are ready for Day Two of the confirmation hearing  
7 in Highland Capital Management, LP, Case No. 19-34054. I'll  
8 just make sure we've got the key parties at the moment. Do we  
9 have Mr. Pomerantz, Mr. Morris, for the Debtor team?

10                  MR. POMERANTZ: Yes. Good morning, Your Honor. Jeff  
11 Pomerantz for the Debtors.

12                  MR. MORRIS: And I'm here as well, Your Honor.

13                  THE COURT: All right. Good.

14                  All right. For our objecting parties, do we have Mr.  
15 Taylor and your crew for Mr. Dondero?

16                  MR. TAYLOR: Yes, Your Honor.

17                  THE COURT: Good morning.

18                  All right. For Dugaboy Trust and Get Good Trust, do we  
19 have Mr. Draper? (No response.) All right. I do see Mr.  
20 Draper. I didn't hear an appearance. You must be on mute.

21                  MR. DRAPER: I'm present, --

22                  THE COURT: Okay.

23                  MR. DRAPER: -- Your Honor.

24                  THE COURT: Okay. Good morning.

25                  MR. DRAPER: I'm present, Your Honor.

1           THE COURT: Good morning. I heard you that time.

2 Thank you.

3           All right. And now for what I'll call the Funds and  
4 Advisors Objectors, do we have Ms. Rukavina present?

5           MR. RUKAVINA: Yes, Your Honor. Good morning.

6           THE COURT: Good morning. All right. And I will  
7 check. Do we have Mr. Clemente or your team there?

8           MR. CLEMENTE: Yes. Good morning, Your Honor. Matt  
9 Clemente from Sidley Austin on behalf of the Committee.

10          THE COURT: All right. Ms. Drawhorn, do we have you  
11 there for the NexPoint Real Estate Partners and related funds?

12          MS. DRAWHORN: Yes, Your Honor. Good morning.

13          THE COURT: Good morning. All right. Did I miss --  
14 I think that captured all of our Objectors. Anyone who I've  
15 missed?

16          All right. Well, when we recessed yesterday, Mr. Morris,  
17 I think you were about to call your third witness; is that  
18 correct?

19          MR. MORRIS: It is, Your Honor. But if I may, I'd  
20 like to just address the objections to the remaining exhibits,  
21 since I hope that won't take too long.

22          THE COURT: All right. You may.

23          MR. POMERANTZ: Actually, Your Honor, before we go  
24 there, we filed the supplemental declaration of Patrick  
25 Leatham, as we indicated we would do yesterday. We just

1 wanted to get confirmation again that nobody intends to cross-  
2 examine him, so that he doesn't have to sit through the  
3 festivities today.

4 THE COURT: All right. Well, I did see that you  
5 filed that.

6 Does anyone anticipate wanting to cross-examine Mr.  
7 Leatham, the balloting agent?

8 MR. RUKAVINA: Your Honor, I take it that that  
9 declaration is part of the record. As long as the Court  
10 confirms that, I do not intend to call the gentlemen.

11 THE COURT: All right. Well, I will take judicial  
12 notice of it and make it part of the record. It appears at  
13 Docket Entry No. 1887. Again, it was filed -- well, it was  
14 actually filed early this morning, I think. So, all right.  
15 So, with --

16 MR. MORRIS: And to avoid --

17 THE COURT: Go ahead.

18 MR. MORRIS: To -- I was just going to say, to avoid  
19 any ambiguity, Your Honor, the Debtor respectfully moves that  
20 document into the evidentiary record.

21 THE COURT: All right. The Court will --

22 (Interruption.)

23 THE COURT: Someone needs to put their phone on mute,  
24 perhaps. Unless someone was intentionally speaking.

25 All right. So, I will grant that request. Docket Entry

1 No. 1887 will be part of the confirmation evidence of this  
2 hearing.

3 (Debtor's Patrick Leatham Declaration at Docket 1887 is  
4 received into evidence.)

5 THE COURT: All right. Anything else? There were  
6 other exhibits I think you were going to talk about?

7 MR. MORRIS: Yeah. Let me just go through them one  
8 at a time, if I may, Your Honor.

9 THE COURT: Okay.

10 MR. MORRIS: All right. So, I'm going to deal with  
11 the transcripts that have been objected to one at a time. And  
12 I'll just take them in order. The first one can be found at  
13 Exhibit B. It is on Docket No. 1822.

14 THE COURT: Okay.

15 MR. MORRIS: Exhibit B is the deposition transcript  
16 from the December 16, 2020 hearing on the Advisor and the  
17 Funds' motion for an order restricting the Debtor from  
18 engaging in certain CLO-related transactions.

19 During that hearing, the Court heard the testimony of  
20 Dustin Norris. Mr. Norris is an executive vice president for  
21 each of the Funds and each of the Advisors.

22 We would be offering the transcript for the limited  
23 purposes of establishing Mr. Dondero's ownership and control  
24 over the Advisors.

25 Mr. Norris also gave some pretty substantial testimony

1 concerning the so-called independent board of the Funds.

2 And as a general matter, Your Honor, to the extent that  
3 the objection is on hearsay grounds, the transcript -- at  
4 least the portions relating to Mr. Norris's testimony --  
5 simply are not hearsay under Evidentiary Rule 801(d)(2).  
6 These are statements of an opposing party, and I think we fall  
7 well within that.

8 So, we would respectfully request that the Court admit  
9 into the record the transcript from December 16th, at least  
10 the portions of which are Mr. Norris's testimony.

11 THE COURT: All right. And, again, these appear at  
12 -- I think I heard you say B and then E. Is that correct?

13 MR. MORRIS: Just B. Just B at the moment. B as in  
14 boy.

15 THE COURT: Okay. Just B at the moment?

16 All right. Any objections to that?

17 MR. RUKAVINA: Your Honor, I had objected, but now  
18 that it's offered for that limited purpose, I withdraw my  
19 objection.

20 THE COURT: All right. Then B -- I'm sorry. Was  
21 there anyone else speaking?

22 B will be admitted. And, again, it appears at Docket  
23 Entry 1822.

24 (Debtor's Exhibit B, Docket Entry 1822, is received into  
25 evidence.)

1                   MR. MORRIS: Okay. Next, the next transcript can be  
2 found at Exhibit 6R, and that's Docket 1866. Exhibit 6R is  
3 the transcript of the January 9, 2020 hearing where the Court  
4 approved the corporate governance settlement. We think that  
5 that transcript is highly relevant, Your Honor, because it  
6 reflects not only Mr. Dondero's notice and active  
7 participation in the consummation of the corporate governance  
8 agreement, but it also reflects the Court and the parties'  
9 views and expectations that were established at that time,  
10 such that if anybody contends that there's any ambiguity about  
11 any aspect of the order, I believe that that would be the best  
12 evidence to resolve any such disputes.

13                  So, for the purpose of establishing Mr. Dondero's notice,  
14 Mr. Dondero's participation, and the parties' discussions and  
15 expectations with regard to every aspect of the corporate  
16 governance settlement, including Mr. Dondero's stipulation,  
17 the order that emerged from it, and the term sheet, we think  
18 that that's properly into evidence.

19                  THE COURT: Any objection?

20                  All right. 6R will be admitted. Again, at Docket Entry  
21 1822.

22                  (Debtor's Exhibit 6R, Docket Entry 1822, is received into  
23 evidence.)

24                  MR. MORRIS: Next, Your Honor, we've got Exhibits 6S  
25 as in Sam and 6T as in Thomas. They're companions. And they

1 can be found at Docket 1866. And those are the transcripts.  
2 The first one is from the October 27th disclosure statement  
3 hearing, and the second one actually is from the Patrick  
4 Daugherty, I believe, lift stay motion.

5 I'll deal with the first one first, Your Honor. We  
6 believe that the transcript of the October 27th hearing goes  
7 to the good faith nature of the Debtor's proposed plan. It  
8 shows that the Debtor and the Committee were not always  
9 aligned on every interest. It shows that the Committee, in  
10 fact, strenuously objected to certain aspects of the then-  
11 proposed plan by the Debtors. And we just think it goes to  
12 the heart of the good faith argument.

13 The transcript for the 28th, we would propose to offer for  
14 the limited purpose of the commentary that you offered at the  
15 end of that hearing, where Your Honor made it clear that  
16 employee releases would not be -- would not likely be  
17 acceptable to the Court unless there was some consideration  
18 paid.

19 And it was really, frankly, Your Honor's comments that  
20 helped spur the Committee and the Debtor to discuss over the  
21 next few weeks the resolution of the issues concerning the  
22 employee releases.

23 So we're not offering Exhibit 6T for anything having to do  
24 with Mr. Daugherty or his claim, but just the latter portion  
25 relating to the discussion about the employee releases. And,

1 with that, we'd move those transcripts into evidence.

2 THE COURT: Any objection?

3 MR. RUKAVINA: Your Honor, yes, I do object. 6S is  
4 hearsay, and under Rule 804(b)(1) it's admissible only if the  
5 witnesses are unavailable to be called. There's been no  
6 suggestion that they're not.

7 As far as 6T, what Your Honor says is not hearsay, so as  
8 long as it's just what Your Honor was saying, I do not object  
9 to 6T. I object to the balance of it.

10 THE COURT: Okay. What about that objection on 6S?

11 MR. MORRIS: Yeah. One second, Your Honor. I would  
12 go to the residual exception to the hearsay rule under 807.  
13 807 specifically applies if the statement being offered is  
14 supported by sufficient guarantees of trustworthiness and it's  
15 more probative on the point -- and the point here is simply to  
16 help buttress the Debtor's good faith argument -- and it's  
17 more probative on the point than any other evidence. And I'm  
18 not sure what better evidence there would be than an on-the-  
19 record discussion between the Debtor and the Committee as to  
20 the disputes they were having on the disclosure statement.

21 THE COURT: All right. I'm going to overrule the  
22 objection and accept that 807 exception as being valid here.  
23 So, I am admitting both 6S and 6T. And for the record, I  
24 think you said they appeared at 1866. They actually appear at  
25 1822.

1                   MR. MORRIS: Okay, Your Honor. I am corrected. It  
2 is 6S and 6T, and they are indeed at 1822. Forgive me.

3                   THE COURT: Okay.

4                   (Debtor's Exhibits 6S and 6T, Docket Entry 1822, is  
5 received into evidence.)

6                   MR. MORRIS: The next transcript and the last one is  
7 6U, which is also at 1822. 6U is the transcript from the  
8 December 10th hearing on the Debtor's motion for a TRO against  
9 Mr. Dondero. We believe the entirety of that transcript is  
10 highly relevant, and it relates specifically to the Debtor's  
11 request for the exculpation, gatekeeper, and injunction  
12 provisions of their plan. And on that basis, we would offer  
13 that into evidence.

14                  THE COURT: Any objection?

15                  MR. TAYLOR: Yes, Your Honor. This is Clay Taylor on  
16 behalf of Mr. Dondero.

17                  We do object, on the same basis that it is hearsay. There  
18 has certainly been plenty of testimony before this Court and  
19 on the record as to why the Debtor believes that its plan  
20 provisions are appropriate and allowable, and there's no need  
21 to allow hearsay in for that. All of the witnesses were  
22 available to be called by the Debtor. The Debtor is in the  
23 midst of its case and can call whoever else it needs to call  
24 to get these into evidence or to get those docs into evidence.  
25 And therefore, we don't believe that any residual exception

1 should apply.

2 THE COURT: Mr. Morris, your response?

3 MR. MORRIS: First, Your Honor, any statements made  
4 by or on behalf of Mr. Dondero would not be hearsay under  
5 801(d)(2).

6 And secondly, there is no other evidence of the Debtor's  
7 motion of the -- of the argument that was had. There is no  
8 other evidence, let alone better evidence, than the transcript  
9 itself. And I believe 807 is certainly the best rule to  
10 capture that.

11 It is a statement that's supported by sufficient  
12 guarantees of trustworthiness. Again, these are the litigants  
13 appearing before Your Honor. It may not be sworn testimony,  
14 but I would hope that everybody is doing their best to comply  
15 with the guarantee of trustworthiness in that regard, putting  
16 aside advocacy.

17 And it is more probative on the point for which we're  
18 offering -- and that is on the very issues of exculpation,  
19 gatekeeper, and injunction -- than anything else we can offer  
20 in that regard.

21 THE COURT: All right. I overrule the objection and  
22 I will admit 6U. Okay.

23 (Debtor's Exhibit 6U, Docket Entry 1822, is received into  
24 evidence.)

25 MR. MORRIS: All right. Going back to the top, Your

1 Honor, Companions Exhibit D as in David and E as in Edward,  
2 which are at Docket 1822.

3         Exhibit D is an email string that relates to the Debtor's  
4 communications with the Creditors' Committee concerning a  
5 transaction known as SSP, which stands for Steel Products --  
6 Structural and Steel Products. So that was an asset that the  
7 Debtor was selling, trying to sell at a particular point in  
8 time. And Exhibit E is a deck that the Debtor had prepared  
9 for the benefit of the UCC.

10         And if we looked at those documents, Your Honor, you'd  
11 see that the Debtor was properly following the protocols that  
12 were put in place in connection with the January 9th corporate  
13 governance settlement. And the Committee is being informed by  
14 the Debtor of what the Debtor intends to do with that  
15 particular asset.

16         And the reason that it's particularly relevant here, Your  
17 Honor, is Dustin Norris had submitted a declaration in support  
18 of their motion that was heard on September -- on December  
19 16th. That declaration is an exhibit to what is Exhibit A on  
20 Docket 1822. Exhibit A on the docket is the Advisor and the  
21 Funds' motion. Okay? So, Exhibit A is the motion. Attached  
22 to that Exhibit A is an exhibit, which is Mr. Norris's  
23 declaration.

24         At Paragraph 9 of Mr. Norris's declaration, he takes issue  
25 with the Debtor's process for the sale of that particular

1 asset.

2 And so, having admitted already into the record Mr.  
3 Norris's declaration, we believe that these documents rebut  
4 the statements made in Mr. Norris's declaration, and indeed,  
5 were part of the transcript that has now already been admitted  
6 into evidence. So we think the documents are needed because  
7 they were exhibits during that hearing.

8 THE COURT: All right. Any objection?

9 MR. RUKAVINA: Your Honor, yes, I object based on  
10 authenticity. This document has not been authenticated, nor  
11 has the attachment. And on hearsay. And I don't think that  
12 the Debtor can introduce one exhibit just to introduce another  
13 to rebut the first.

14 THE COURT: Your response?

15 MR. MORRIS: You know, in all honesty, I wish that  
16 the authenticity objection had been made yesterday and I might  
17 have been able to deal with that.

18 These documents have already been admitted by the Court  
19 against these very same parties. I think it would be a little  
20 unfair for them now to exclude the document that they had no  
21 objection to the first time around. They clearly relate to  
22 Paragraph 9 of Mr. Norris's declaration, which was admitted  
23 into evidence in this case without objection.

24 THE COURT: All right. I overrule the objection. D  
25 and E are admitted.

1                   (Debtor's Exhibits D and E, Docket Entry 1822, is received  
2 into evidence.)

3                   MR. MORRIS: Next, Your Honor, we have Exhibits 4D as  
4 in David, 4E as in Edward, and 4G as in Gregory. And those  
5 can all be found on Docket 1822. And to just cut to the  
6 chase, Your Honor, these are the K&L Gates letter that were  
7 sent in late December and my firm's responses to those  
8 letters.

9                   Those letters are being offered, again, to support --  
10 well, the Debtor contends that, in the context of this case,  
11 and at the time and under the circumstances, the letters  
12 constituted interference and evinces a disregard for the  
13 January 9th order, for Mr. Dondero's TRO, and for the Court's  
14 comments at the December 16th hearing. And they go  
15 specifically to the Debtor's request for the gatekeeper,  
16 exculpation, and injunction provisions.

17                  To the extent that those exhibits contain the letters that  
18 were sent on behalf of the Funds and on behalf of the  
19 Advisors, they would simply not be hearsay under 801(d) (2).  
20 And to the extent the objection goes to my firm's response, I  
21 think just as a matter of completeness the Court -- I won't  
22 offer them for the truth of the matter asserted. I'll simply  
23 offer the Pachulski responses at those exhibits for the  
24 purpose of stating the Debtor's position, without regard to  
25 the truth of the matter asserted.

1                   THE COURT: All right. Any objection?

2                   MR. RUKAVINA: Your Honor, with that understanding,  
3 I'll withdraw my objection to these exhibits.

4                   THE COURT: All right. So, 4D, 4E, and 4G are  
5 admitted.

6                   (Debtor's Exhibits 4D, 4E, and 4G, Docket Entry 1822, are  
7 received into evidence.)

8                   MR. MORRIS: Next, Your Honor, we've got Exhibit 5T  
9 as in Thomas. That document can be found at Docket No. 1822.  
10 Your Honor, that document is a schedule of a long list of  
11 promissory notes that are owed to the Debtor by the Advisors,  
12 Dugaboy, and Mr. Dondero. But I think that, upon reflection,  
13 I'll withdraw that exhibit.

14                  THE COURT: All right.

15                  (Debtor's Exhibit 5T is withdrawn.)

16                  MR. MORRIS: And then, finally, just one last one. I  
17 think Mr. Rukavina objected to Exhibit 70 as in Oscar, which  
18 can be found at Docket No. 1877. Exhibit 70 are the documents  
19 that were admitted in the January 21st hearing, and I believe  
20 that they all go -- they're being offered to support the  
21 Debtor's application for the gatekeeper, exculpation, and  
22 injunction provisions.

23                  THE COURT: All right. 70 is being offered. Any  
24 objection?

25                  MR. RUKAVINA: Yes, Your Honor. I do object. Those

1 are exhibits from a separate adversary proceeding that has not  
2 been concluded. In fact, my witness is still on the stand in  
3 that.

4 And I'll note that that's another 20,000 pages that's very  
5 duplicative of the current record, and we already are going to  
6 have an unwieldy record. So I question why Mr. Norris -- why  
7 Mr. Morris would even need this.

8 So that's my objection, Your Honor.

9 MR. MORRIS: You know what? That's a fair point,  
10 Your Honor. And -- that is a fair point, and I guess what I'd  
11 like to do is at some point this morning see if I can single  
12 out documents that are not duplicative and come back to you  
13 with very specific documents. I think that's a very fair  
14 point.

15 THE COURT: All right.

16 MR. MORRIS: And with that, Your Honor, I think we've  
17 now addressed every single document that the Debtor has  
18 offered into evidence, and I believe, other than the  
19 withdrawal of --

20 THE COURT: 5T.

21 MR. MORRIS: -- 5T --

22 THE COURT: Uh-huh.

23 MR. MORRIS: -- and the open question on 70, I  
24 believe every single document at Docket 1822, 1866, and 1877  
25 has been admitted. Do I have that right?

1           THE COURT: All right. Yes, because I did admit  
2 yesterday 7F through 7Q, minus 7O, at 1877. So, yes, I agree  
3 with what you just said.

4           MR. RUKAVINA: Your Honor, I apologize. And Mr.  
5 Morris. I have that 5S -- or six -- that 5S and 6C, Legal  
6 Entities List, have not been admitted. But if I'm wrong on  
7 that, then I apologize.

8           THE COURT: Okay. 5S was part of 1866, which I  
9 admitted entirely.

10          And what was the other thing?

11          MR. RUKAVINA: I'm counting letters, Your Honor.  
12 One, two, three, four. 6D, Legal Entities List, Redacted.

13          THE COURT: Okay. 6B would have been --

14          MR. RUKAVINA: D, Your Honor, as in dog. I'm sorry.  
15 6-dog.

16          THE COURT: Okay. 6D, yeah, that was part of 1822  
17 that I admitted *en masse* yesterday.

18          MR. MORRIS: Yeah, I didn't hear an objection to that  
19 one yesterday, and I agree, Your Honor. My records show that  
20 it was already admitted.

21          MR. RUKAVINA: Then I apologize to the Court.

22          THE COURT: All right. Any --

23          MR. MORRIS: No worries. Let's get --

24          THE COURT: Any other housekeeping matters before we  
25 go to the next witness?

1 MR. MORRIS: No, Your Honor. Not from the Debtor.

2 THE COURT: Anyone else?

3 All right. Well, let's hear from the next witness.

4 MR. MORRIS: All right, Your Honor. The Debtor calls  
5 as its next and last witness Marc Tauber.

6 THE COURT: All right. Mr. --

7 MR. MORRIS: Mr. Tauber, if you're on the phone,  
8 please identify yourself.

9 (No response.)

10 THE COURT: Mr. Tauber, we're not hearing you.

11 Perhaps you are on mute. Could you unmute your device?

12 (No response.)

13 THE COURT: All right. If it's a phone, you need to  
14 hit \*6.

15 Hmm. Any -- do you know which caller he is?

16 THE CLERK: I'm trying to find out.

17 THE COURT: All right. We've got well over a hundred  
18 people, so we can't easily identify where he is at the moment.

19 All right. Mr. Tauber, Marc Tauber? This is Judge  
20 Jernigan. We cannot hear you, so -- all right. Well, maybe  
21 we can --

22 MR. MORRIS: Can we just take a three-minute break  
23 and let me see if I can track him down?

24 THE COURT: Yes. Why don't you do that? So let's  
25 take a three-minute break.

1 MR. MORRIS: Thank you, Your Honor.

2 THE COURT: Okay.

3 (A recess ensued from 10:02 a.m. until 10:04 a.m.)

4 MR. MORRIS: Your Honor, if we may, he'll be dialing  
5 in in a moment. But I've been reminded that there is one more  
6 exhibit. It's the exhibit I used on rebuttal yesterday with  
7 Mr. Seery. There was the one document that was on the docket,  
8 and that was the Debtor's omnibus reply to the plan  
9 objections, where we looked at Paragraph 135, I believe. And  
10 we would offer that into evidence for the purpose of just  
11 establishing that the Debtor had given notice no later than  
12 January 22nd of its agreement in principle to assume the CLO  
13 management contracts.

14 And then the second exhibit that we had offered that I  
15 think I suggested could be marked as Exhibit 10A was the email  
16 string between my firm and counsel for the CLO Issuers where  
17 they agreed to the agreement in principle for the Debtor's  
18 assumption of the CLO management contracts.

19 And we would offer both of those documents into evidence  
20 as well.

21 THE COURT: All right. Any objections?

22 All right. Well, I will admit them.

23 As far as this email string with the CLO Issuers that you  
24 called 10A, does that appear on the docket? I remember you  
25 putting it on the screen, but, if not, you'll need to file a

1 supplement to the record, a supplemental exhibit.

2 MR. MORRIS: We will, Your Honor. We'll do that for  
3 both of those exhibits.

4 THE COURT: And then as -- okay, for both? Because I  
5 -- I've read that reply, and I could reference the docket  
6 number if we need to.

7 MR. MORRIS: We'll clean that up, Your Honor.

8 THE COURT: Okay.

9 (Debtor's Exhibit 10A is received into evidence.)

10 (Clerk advises Court re new caller.)

11 THE COURT: Oh, okay. Just a minute. I was looking  
12 up something.

13 (Pause.)

14 THE COURT: All right. Well, you're going to file --  
15 hmm, I really wanted to just reference where that reply brief  
16 appears on the record. There were a heck of a lot of things  
17 filed on January 22nd.

18 (Interruption.)

19 THE COURT: Okay. We'll --

20 MR. MORRIS: All right. We're just going to need one  
21 more minute with Mr. Tauber. It's my fault, Your Honor.

22 THE COURT: Okay.

23 MR. MORRIS: I didn't send him easily-digestible  
24 dial-in instructions. He'll be just a moment.

25 THE COURT: Okay.

1 (Court confers with Clerk regarding exhibit.)

2 THE COURT: Oh, it's at 1807? Okay. So, the reply  
3 brief that we talked about Paragraph 35, that is at Docket No.  
4 1807. Okay? All right.

5 (Debtor's Omnibus Reply to Plan Objections, Docket 1807,  
6 is received into evidence.)

7 (Pause.)

8 MR. TAUBER: Hi. It's Marc Tauber.

9 THE COURT: All right.

10 MR. MORRIS: Excellent.

11 THE COURT: Mr. Tauber, this is Judge Jernigan. I  
12 can hear you, but I can't see you. Do you have a video --

13 MR. TAUBER: Yeah, I don't know why it's not working.

14 THE COURT: Hmm.

15 MR. TAUBER: I'm on WebEx all day. Usually it works  
16 no problem.

17 THE COURT: Okay. Well, do you want to give it  
18 another try or two?

19 MR. TAUBER: Yeah. It looks like it's starting to  
20 come up. It's all -- pictures, so --

21 THE COURT: Okay.

22 MR. TAUBER: -- hopefully you'll be able to see me in  
23 a second.

24 THE COURT: Okay. The first thing I'm going to need  
25 to do is swear you in, so we'll see if the video comes up here

1 in a minute.

2 MR. TAUBER: Okay.

3 THE COURT: Can you see us, Mr. Tauber?

4 MR. TAUBER: I can see four people. The rest are  
5 just names still.

6 THE COURT: Okay.

7 MR. TAUBER: I can go out and try to come back in, if  
8 you think that's --

9 THE COURT: I'm afraid of losing you. So, your  
10 audio, is it on your phone or is it on --

11 MR. TAUBER: No.

12 THE COURT: -- a computer?

13 MR. TAUBER: On the computer. Yeah.

14 THE COURT: Okay. So you're coming through loud and  
15 clear on your computer.

16 MR. TAUBER: Yeah. Like I said, we use WebEx for  
17 work, so I have them on all day long without any issues,  
18 typically.

19 THE COURT: Okay.

20 (Court confers with Clerk.)

21 THE COURT: Okay. Our court reporter thinks it's a  
22 bandwidth issue on your end, so I don't --

23 MR. TAUBER: There's only two of us here at home on  
24 the line right now, so I don't know why. It looks like it's  
25 trying to come in, and then just keeps --

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1           THE COURT: I at least see your name on the screen  
2 now, which I did not before.

3           MR. TAUBER: Yeah.

4           THE COURT: So hopefully we're going to -- ah. We  
5 got you.

6           MR. TAUBER: There it is.

7           THE COURT: All right.

8           MR. TAUBER: Yeah.

9           MR. MORRIS: There we go.

10          MR. TAUBER: I might lose you, though. Give me one  
11 second, because I have a thing saying the WebEx meeting has  
12 stopped working. Let me close that.

13          THE COURT: Okay. We've still got you. Please raise  
14 your right hand.

15          MR. TAUBER: Okay.

16                   MARC TAUBER, DEBTOR'S WITNESS, SWORN

17          THE COURT: All right. Thank you. Mr. Morris?

18          MR. MORRIS: Thank you, Your Honor.

19                   DIRECT EXAMINATION

20 BY MR. MORRIS:

21 Q Good morning, Mr. Tauber.

22 A Good morning.

23 Q I apologize for the delay in getting you the information.  
24 Are you currently employed, sir?

25 A Yes, sir.

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1 Q By whom?

2 A Aon Financial Services.

3 Q And does Aon Financial Services provide insurance  
4 brokerage services among its services?

5 A Yes.

6 Q And what position do you currently hold?

7 A Vice president.

8 Q How long have you been a vice president at Aon?

9 A Since October of 2019.

10 Q Can you just describe for the Court generally your  
11 professional background?

12 A Sure. I spent about 20 years on Wall Street, working in a  
13 variety of jobs, in research, trading, and as the COO of a  
14 hedge fund. And then in 2010 I switched to the insurance  
15 world. I was an underwriter for ten-plus years for Zurich and  
16 QBE. And then in 2019 switched to the brokering side for Aon.

17 Q And what are your duties and responsibilities as a vice  
18 president at Aon?

19 A Well, we're responsible or my team and I are responsible  
20 for creating bespoke insurance programs, focusing on D&O and  
21 E&O insurance for our insureds.

22 Q And what is, for the benefit of the record, what do you  
23 mean by bespoke insurance program?

24 A Well, each client is different, so the programs and the  
25 policies that we put in place might be off-the-shelf policies,

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1 but we endorse and amend them as needed to meet the needs of  
2 the individual client.

3 Q And during your work, both as an underwriter and now as a  
4 broker, have you familiarized yourself with the market for D&O  
5 and E&O insurance policies?

6 A Yes.

7 Q All right. Let's talk about the early part of this case.  
8 Did there come a time in early 2020 when Aon was asked to  
9 place insurance on behalf of the board of Strand Advisors?

10 A Yes.

11 Q Can you describe for the Court how that came about?

12 A Sure. One of our account executives, a man by the name of  
13 Jim O'Neill, had a relationship with a man named John Dubel,  
14 who was one of the appointees to serve on -- as a member of  
15 Strand, which was being appointed, as we understood it, to be  
16 the general partner of Highland Capital Management by the  
17 Bankruptcy Court. And they -- we had done -- or, Jim and John  
18 had a longstanding relationship. I had actually underwritten  
19 an account for a previous appointment of John's when I was an  
20 underwriter, so I had some familiarity with John as well, and  
21 actually brokered a subsequent deal for John at Aon.

22 So I had, again, some familiarity with John, and we were,  
23 you know, tasked with going out and finding a program for  
24 Strand.

25 Q Can you describe what happened next? How did you go about

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1 accomplishing that task?

2 A So, there are a number of markets or insurance companies  
3 that provide management liability insurance, which this was a  
4 management liability-type policy. D&O is a synonym for  
5 management liability, I guess you'd say. And we approached  
6 the, I think, 14 or 15 markets that we knew to provide  
7 insurance in this space and that would be willing to buy the  
8 type of policy we were seeking and have interest in a risk  
9 like this, which had a little hair on it. Obviously, there  
10 was the Dondero involvement, as well as the bankruptcy.

11 Q As part of that process, did you and your firm put  
12 together a package of information for prospective interested  
13 parties?

14 A Yes.

15 Q Can you describe for the Court what was contained in the  
16 package?

17 A Had the C.V.s, some relevant pleadings from the case,  
18 court order. I'd have to go back and look exactly. But sort  
19 of just general, you know, general information that was  
20 available about the situation at hand and Strand's  
21 appointment.

22 Q And the court order that you just mentioned, is that the  
23 one that had that gatekeeper provision in it?

24 A Correct.

25 Q And can you explain to the Court why you and your team

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1 decided to include the order with the gatekeeper provision in  
2 the package that you were delivering to prospective carriers?

3 A Sure. In our initial conversations to discuss our  
4 engagement, the gatekeeper function was explained to us by  
5 John. And I'm not sure who else was on the initial call.  
6 And, but it was explained to us that I guess Judge Jernigan  
7 would sit as the gatekeeper between any potential claimant  
8 against the insureds and, you know, would basically have to  
9 approve any claim that would be made against (indecipherable),  
10 which would thereby prevent any frivolous claims from  
11 happening.

12 Q All right. Let's just talk for a moment. How did you and  
13 your firm decide which underwriters to present the package to?

14 A Again, you know, I -- my background, or my Wall Street  
15 background, obviously, sort of made me have a -- it was very  
16 unique for the insurance world when I switched over, so I had  
17 sort of risen to a certain level of expertise within the  
18 space. And, you know, our team also is very experienced, and  
19 decades of experience in the insurance world. So we're very  
20 familiar with the markets that are willing to provide these  
21 types of policies and the markets that would be likely to take  
22 a look at a risk such as this.

23 Q Okay. You mentioned that there was -- I think your words  
24 were a little hair on this, and one of the things you  
25 mentioned was bankruptcy. How did the fact that Strand was

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1 the general partner of a debtor in bankruptcy impact your  
2 ability to solicit D&O insurance?

3 A Well, it's just not a plain vanilla situation, so people  
4 are somewhat, you know, are -- I think -- so, the type of  
5 insurance, D&O insurance, that we write is very different from  
6 auto insurance, as an example. Auto insurance, people expect  
7 there to be a certain amount of claims, and they expect the  
8 premiums to cover the claims plus the expenses and then  
9 provide them a reasonable profit on top of that.

10 Our insurance is really much more by binary. The  
11 expectation for underwriters is that they will be completing  
12 ignoring -- or, avoiding risk at all costs, wherever possible.  
13 So anytime there is a situation that looks a little risky, so  
14 the premium might be a little higher, the deductible might be  
15 a little higher, but, again, the underwriters are really  
16 making a bet that they will not have a claim. Because the  
17 premiums pale in comparison to the limits that are available  
18 to the policyholder.

19 Q And so --

20 A So, -- I'm sorry. What were you going to say?

21 Q I didn't mean to interrupt.

22 A Yeah.

23 Q Have you finished your answer?

24 A Sure.

25 Q Okay. So, were some of the 14 or 15 markets that you

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1 contacted reluctant to underwrite because there was a  
2 bankruptcy ongoing?

3 A Well, I think that probably -- I mean, there are certain  
4 markets that we didn't go to in the beginning because they  
5 would be very reluctant to write a risk that had that kind of  
6 hair on it, based on our experience from dealing with them.  
7 And, you know, I think the bankruptcy was certainly a little  
8 bit of an issue. And then, obviously, as people did their  
9 research and -- or if they weren't already familiar with  
10 Highland and got to know, you know, got -- I will just say for  
11 a simple Google search and learned a little bit about Mr.  
12 Dondero, I think there was definitely some significant  
13 reluctance to write this program.

14 Q Was the fact that the Debtor -- was the fact that the  
15 Debtor is a partnership an issue that came up, in your -- in  
16 your process?

17 A There are certainly some carriers who won't write what's  
18 known as general partnership liability insurance. So, yes,  
19 that is part of that. It was part of the limiting factor in  
20 terms of who we went to.

21 Q Okay. And, finally, you mentioned Mr. Dondero. What role  
22 did he play in your ability to obtain insurance for the Strand  
23 board?

24 A Well, that's a very significant role. As, you know, as  
25 mentioned, the underwriters are very risk-averse, so the

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1 litigiousness of Mr. Dondero is a very strong red flag  
2 prohibiting a number of people from writing the insurance at  
3 all. And the ones that were writing, that were willing to  
4 provide options, were looking for protections from Mr.  
5 Dondero.

6 Q And what kind of protections were they looking for?

7 A Well, the gatekeeper function was a key factor. That was  
8 really the only way we could even start a conversation with  
9 any of the people that we were able to engage. And in  
10 addition, they wanted a, you know, sort of a belts and  
11 suspenders additional protection of having an exclusion  
12 preventing any litigation brought by or on behalf of Mr.  
13 Dondero.

14 Q Were you able to identify any carrier who was prepared to  
15 underwrite D&O insurance for Strand without the gatekeeper  
16 provision or without a Dondero exclusion?

17 A We were not.

18 Q Okay. Let's fast-forward now. Has your firm been  
19 requested to obtain professional management insurance for the  
20 contemplated post-confirmation debtor entities and individuals  
21 associated with those entities?

22 A Yes.

23 Q Okay. So let's just talk about the entities first, the  
24 Claimant Trust and the Litigation Trust. In response to that  
25 request, have you and your team gone out into the marketplace

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1 to try to find an underwriter willing to underwrite a policy  
2 for those entities?

3 A Yes.

4 Q And have you been able to find any carrier who's willing  
5 to provide coverage for the Claimant Trust and the Litigation  
6 Trust?

7 A Yes.

8 Q And how many -- how many have expressed a willingness to  
9 do that?

10 A Two.

11 Q And have those two carriers indicated that there would be  
12 conditions to coverage for the entities?

13 A Both will require a -- the continuation of the gatekeeper  
14 function, as well as a Dondero exclusion.

15 Q Okay. Have you also been tasked with the responsibility  
16 of trying to find coverage for the individuals associated with  
17 the Claimant Trust and the Litigation Trust, meaning the  
18 Claimant Trustee, the Litigation Trustee, and the Oversight  
19 Board?

20 A Yes. So we did it concurrently.

21 Q Okay. So, are the two firms that you just mentioned  
22 willing to provide insurance for the individuals as well as  
23 the entities?

24 A Correct. With the same stipulations.

25 Q They require -- they both require the gatekeeper and the

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1 Dondero exclusion?

2 A That's correct.

3 Q Is there any other firm who has indicated a willingness to  
4 consider providing D&O insurance for the individuals?

5 A There is one that is willing to do so, as long as the  
6 gatekeeper function remains in place. They have indicated  
7 that if the gatekeeper function was to be removed, that they  
8 would then add a Dondero exclusion to their coverage.

9 Q So is there any insurance carrier that you're aware of who  
10 is prepared to insure either the individuals or the entities  
11 without a gatekeeper provision?

12 A No.

13 Q And that last company, I just want to make sure the record  
14 is clear: If the gatekeeper provision is overturned on appeal  
15 or is otherwise not effective, do you have an understanding as  
16 to what happens to the insurance coverage?

17 A They will either add an exclusion for any claims brought  
18 by or on behalf of Mr. Dondero or cancel the coverage  
19 altogether.

20 MR. MORRIS: I have no further questions, Your Honor.

21 THE COURT: All right. Cross of this witness?

22 CROSS-EXAMINATION

23 BY MR. RUKAVINA:

24 Q Mr. Tauber, I'm a little confused. So, the insurance  
25 that's being written now for the post-bankruptcy entities, did

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1 I hear you say that there is one carrier that would give that  
2 insurance subject to having a Dondero exclusion?

3 A So, first of all, there's nothing currently being written.  
4 We have solicited quotes. So, just to make sure that that --  
5 I want to make sure that's clear.

6 We have three carriers that are willing to provide varying  
7 levels of coverage. All three will only do so with the  
8 existence of the gatekeeper function continuing to be in  
9 place. One of the three has -- two of those three will also  
10 provide the coverage with -- even with the gatekeeper function  
11 and the Dondero exclusion. The third one was not requiring a  
12 Dondero exclusion unless the gatekeeper function goes away.

13 Q Okay. So the third one, you believe, will, whatever the  
14 term is, write the insurance or provide the coverage without a  
15 gatekeeper, as long as there is a strong Dondero exclusion?

16 A No. Their initial requirement is that the gatekeeper  
17 function remains in place. That is their preferred option.  
18 If the gatekeeper function is removed, then they will add a  
19 Dondero exclusion in place of the gatekeeper exclusion. In  
20 addition, that carrier is only willing to provide coverage for  
21 the individuals, not for the entities.

22 Q Okay. Thank you.

23 MR. RUKAVINA: I'll pass the witness, Your Honor.

24 THE COURT: All right. Other cross?

25 MR. TAYLOR: Clay Taylor on behalf of Mr. Dondero.

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1 THE COURT: Okay.

2 CROSS-EXAMINATION

3 BY MR. TAYLOR:

4 Q Good morning, Mr. Tauber.

5 A Good morning.

6 Q Are you generally familiar with placing D&O insurance at  
7 distressed debt level private equity firms?

8 A I am familiar with it probably more from the underwriting  
9 side, and I also worked at a fund that was distressed and had  
10 to be liquidated, so I -- as the COO, so I have a fair amount  
11 of familiarity, yes.

12 Q Okay. Before taking this to market for the first time for  
13 the pre-confirmation policies that you have in place, did your  
14 firm conduct any due diligence or analysis of comparing the  
15 amount of litigation the Highland entities and Mr. Dondero  
16 were involved in as compared to other comparable firms in the  
17 marketplace? Say, you know, Apollo, Fortress, Cerberus, other  
18 similar market participants?

19 A Well, it wouldn't really be our role as the broker.  
20 That's the role of the underwriter.

21 Q Are you familiar if any of the underwriters undertook any  
22 such analysis?

23 A I would assume that they did, since they all had concerns  
24 about Mr. Dondero almost immediately.

25 Q Do you have any -- you didn't conduct any personal due

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1 diligence on comparing the amount of litigation that the  
2 Highland entities were involved in as compared to, say,  
3 Fortress, do you?

4 A Well, again, that wouldn't really be my role as the  
5 broker. But I will say that I used to write the primary  
6 insurance for Fortress Investment Group when I was at Zurich.  
7 So I'm extremely familiar with Fortress, to use your example,  
8 and I would say that the level of litigation at Fortress was  
9 much, just out of personal knowledge, was significantly less  
10 than I had encountered or than I had read about at Highland.

11 Q That you have read about? Is that based upon a number of  
12 cases where Fortress was a plaintiff as compared to Highland  
13 was a plaintiff? Over what time period?

14 A Again, not my role. Not something that I've done. I'm  
15 just generally familiar with Fortress and I'm generally  
16 familiar with Highland.

17 Q All right. So you're generally familiar and you say that  
18 -- you're telling me and this Court that Fortress is involved  
19 in less litigation. Could you quantify that for me, please?

20 A No, but it's really irrelevant to the situation at hand.  
21 The issue is not my feelings whatsoever. The issue is the  
22 underwriters' feelings and their concern with Mr. Dondero, not  
23 mine or anybody else's.

24 Q So, I appreciate your answer and thank you for that, but I  
25 believe the question that was before you is, have you

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1 quantitatively -- do you have any quantitative analysis by  
2 which you can back up the statement that Fortress is less  
3 litigious than Highland?

4 A I wouldn't even try, no.

5 Q Okay. Do you have any quantitative analysis for -- that  
6 Cerberus is any less litigious than Highland?

7 A I don't have any real knowledge of Cerberus's  
8 litigiousness.

9 Q Same question as to Apollo.

10 A Again, the Fortress, you just happened to mention  
11 Fortress, which was a special case because I used to be their  
12 primary underwriter. I don't have any specific -- I'm not a  
13 claims attorney. I don't have any specific knowledge of the  
14 level of litigiousness.

15 And, again, it's not up to me, my decision. It's the  
16 underwriters' decision of whether or not they're willing to  
17 write the coverage, not mine.

18 Q You mentioned that the -- when you took this out to  
19 market, it had a little hair on it. Correct?

20 A Correct.

21 Q And you put together a package of materials that you sent  
22 out to 14 or 15 market participants; is -- did I get that  
23 correct?

24 A Yes.

25 Q And in that package, you had certain pleadings, including

Tauber - Cross

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1 the court order, correct?

2 A Yes. I believe that's correct.

3 Q And that was after your initial conversation with John and  
4 -- where he pointed out the gatekeeper role. Correct?

5 A Correct.

6 Q And so when you went out to market, presumably you  
7 highlighted the gatekeeper role to all the people you  
8 solicited offers from because you thought it included less  
9 risk, correct?

10 A It offered a level of protection that was not -- that's  
11 not common. So it's, yes, it's a huge selling point for the  
12 risk.

13 Q Okay. So, to be clear, you never went out to the market  
14 to even see if you could get underwriting the first time  
15 without the gatekeeper function; is that correct?

16 A Well, it's my job as a broker to present the risk in the  
17 best possible light. So if we have a fact that makes the risk  
18 a better write for the underwriters, we, of course, will  
19 highlight it. So, no, I did not do that.

20 Q Okay. So, the quick answer to the question is no, you did  
21 not go out and solicit any bids without the gatekeeper  
22 function?

23 A Correct.

24 Q When you have approached the market for the post-  
25 confirmation potential coverage, did you approach the same 14

Tauber - Cross

40

1 or 15 parties that you did before?

2 A I don't have the two lists in front of me. They would  
3 have been vastly similar, yes.

4 Q Okay. And so, again, all of the 14 or 15 parties or the  
5 lists that you solicited were already familiar with the  
6 gatekeeper function, correct?

7 A Yes.

8 Q And so therefore they already had that right; they're not  
9 going to trade against themselves and therefore say that,  
10 without it, we'll go ahead and write coverage. Correct?

11 A I -- I -- it'd be hard to answer that question. I don't  
12 know.

13 Q Okay. Because you didn't try that, did you?

14 A I would have had no reason to, no.

15 Q Okay. So you don't know if a market exists without the  
16 gatekeeper function because you haven't asked, have you?

17 A I guess that's fair, yeah.

18 MR. TAYLOR: I have no further questions.

19 THE COURT: All right. Any other Objectors with  
20 cross-examination?

21 MR. DRAPER: I have no questions for the witness,  
22 Your Honor.

23 THE COURT: All right. Anyone else? Mr. Morris,  
24 redirect?

25 MR. MORRIS: Just one.

Tauber - Redirect

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1 REDIRECT EXAMINATION

2 BY MR. MORRIS:

3 Q One question, Mr. Tauber. Is there any -- do all  
4 underwriters -- any underwriters for Fortress require, as a  
5 condition to underwriting the D&O insurance, require a  
6 gatekeeping provision?

7 A In my, you know, 11, 12 years of experience in this  
8 industry, in this space, I have never seen that gatekeeper  
9 function be available, as an underwriter or as a broker. So,  
10 no.

11 MR. MORRIS: No further questions, Your Honor.

12 THE COURT: Any recross on that redirect?

13 All right. Well, Mr. Tauber, you are excused. We thank  
14 you for your testimony today. So you can log off.

15 THE WITNESS: Thank you.

16 THE COURT: Okay.

17 (The witness is excused.)

18 THE COURT: Mr. Morris, does the Debtor rest?

19 MR. MORRIS: The Debtor does rest, Your Honor.

20 THE COURT: All right. Well, what are we going to  
21 have from the Objectors as far as evidence?

22 MR. RUKAVINA: Your Honor, I will be very short. I  
23 will call Mr. Seery for less than ten minutes. I will call  
24 Mr. Post for less than ten minutes. I will have one exhibit.  
25 And I think that that's it for all the Objectors, unless I'm

1 mistaken, gentlemen.

2 MR. TAYLOR: Your Honor, I had one witness, Mr.  
3 Sevilla, under subpoena to testify, and needed a brief moment  
4 to discuss with my colleagues whether we're going to call him,  
5 and if so, put him on notice that he would be coming up  
6 probably about -- I don't know your schedule, Your Honor, but  
7 probably, I'm guessing, either before lunch or after, and I  
8 need to let him know that also.

9 So I do need a brief three to five minutes to confer with  
10 my colleagues and some direction from the Court to, if we  
11 decide to call him, as to when we would tell him to be  
12 available.

13 THE COURT: All right. Well, before I get to that,  
14 Mr. Draper, do you have any witnesses?

15 MR. DRAPER: I do not.

16 THE COURT: All right. Well, let's see. It's 10:34.  
17 We're making good time this morning. If Seery is truly ten  
18 minutes of direct, and Post is truly ten minutes of direct,  
19 and I don't know how long the documentary exhibits are going  
20 to take, it sounds to me like we are very likely to get to Mr.  
21 Sevilla before a lunch break.

22 So if you want to -- you know, I don't know what that  
23 involves, you sending text messages or making a quick phone  
24 call. Do you need a five-minute break for that?

25 MR. TAYLOR: Yes, Your Honor. It involves a phone

1 call and an email. Just a confirmatory phone call just to  
2 make sure that the guy -- just so you know who he is, he is  
3 actually a Highland employee, but he's represented by separate  
4 counsel, and so we do need to go through him just because  
5 that's the right thing to do.

6 THE COURT: All right. Well, again, I mean, I never  
7 know how long cross is going to take, but I'm guessing, you  
8 know, we're going to get to him in an hour or so, if not  
9 sooner, it sounds like. So, all right. So, do we need a  
10 five-minute break?

11 MR. RUKAVINA: And Your Honor, it might make more  
12 sense to make it a ten-minute break. I suspect that Mr.  
13 Taylor will be able to release his witness if he and I will  
14 just be able to talk. So I would ask the Court's indulgence  
15 for a ten-minuter.

16 THE COURT: Okay. We'll take a ten-minute break.  
17 We'll come back at 10:46 Central time.

18 THE CLERK: All rise.

19 (A recess ensued from 10:36 a.m. until 10:46 a.m.)

20 THE CLERK: All rise.

21 THE COURT: Please be seated. We're going back on  
22 the record in the Highland confirmation hearing. Are the  
23 Objectors ready to proceed?

24 MR. RUKAVINA: Your Honor, Davor Rukavina. We are.

25 THE COURT: All right. Well, Mr. Rukavina, are you

1 going to call your witnesses first?

2 MR. RUKAVINA: Yes, I will. Before that, if it might  
3 help the Court and Mr. Morris: Mr. Morris, with respect to  
4 that last exhibit, I do not object to the admission of any of  
5 the exhibits that were admitted at that PI hearing.

6 But I do think, Your Honor, for the record, that -- and I  
7 would ask Mr. Morris that he should refile those exhibits here  
8 in this case, except for those that are duplicative. Because,  
9 again, there's 10,000 pages of indentures, et cetera.

10 MR. MORRIS: Thank you very much, sir.

11 Your Honor, if that's acceptable to you, we'll do that as  
12 soon as possible.

13 THE COURT: All right. And let me make sure the  
14 record is clear. Are we talking about what you've described  
15 as 70? I'm getting mixed up now. Am I --

16 MR. MORRIS: Yes, Your Honor.

17 THE COURT: Okay.

18 MR. MORRIS: It's 70, which is the documents that  
19 were introduced into evidence in the prior hearing. And Mr.  
20 Rukavina is exactly right, that there is substantial overlap  
21 between that and other documents that have already been  
22 admitted in the record in this case. So we'll just file an  
23 abridged version of Exhibit O that only includes non-  
24 duplicative documents.

25 THE COURT: All right. So that will be admitted, and

Seery - Direct

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1 we'll look for your filed abridged version to show up on the  
2 docket. 70.

3 (Debtor's Exhibit 70 is received into evidence as  
4 specified.)

5 THE COURT: All right. What's next?

6 MR. RUKAVINA: Your Honor, Jim Seery, please. Mr.  
7 James Seery.

8 THE COURT: All right. Mr. Seery, welcome back.  
9 Please raise your right hand.

10 MR. SEERY: Can you -- can you hear me, Your Honor?

11 THE COURT: I can now.

12 JAMES P. SEERY, CERTAIN FUNDS AND ADVISORS' WITNESS, SWORN

13 THE COURT: All right. Thank you.

14 Mr. Rukavina, go ahead.

15 DIRECT EXAMINATION

16 BY MR. RUKAVINA:

17 Q Mr. Seery, --

18 MR. RUKAVINA: Thank you.

19 BY MR. RUKAVINA:

20 Q Mr. Seery, good morning.

21 MR. RUKAVINA: Mr. Vasek, if you'll please pull up  
22 the schedules.

23 What we have here, Your Honor, is Docket 247, the Debtor's  
24 schedules. I'd ask the Court to take judicial notice of it.

25 THE COURT: All right. The Court will do so.

Seery - Direct

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1 BY MR. RUKAVINA:

2 Q Mr. Seery, are you familiar with these entities listed  
3 here on the Debtor's schedules?

4 A Generally. Each one a little bit different.

5 Q Okay. Do you agree that the Debtor still owns equity  
6 interests in these entities?

7 A I believe it does, yes.

8 Q Okay. Is it true that none of these entities are publicly  
9 traded?

10 A I don't believe any of these are publicly-traded entities,  
11 no.

12 Q Okay. And none of these, to your knowledge, are debtors  
13 in this bankruptcy case, right?

14 A No. We only have one debtor in the case.

15 Q Okay. So, Highland Select Equity Fund, LP, the Debtor  
16 owns more than 20 percent of the equity in that entity, right?

17 A I believe the Debtor owns the majority of that entity.

18 That is a fund with an on- and offshore feeder. And I, off  
19 the top of my head, don't recall exactly how the allocations  
20 of equity work. But I believe we do.

21 Q Does 67 percent refresh your memory? Are you prepared to  
22 say that the Debtor owns 67 percent of that equity?

23 A I'm not prepared to say that, no.

24 Q Okay. Wright, Ltd. Does the Debtor own more than 20  
25 percent of that equity?

Seery - Direct

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1 A There's about -- I don't recall. There's about at least  
2 25 artist, designers, or designs. Wright, AMES, Hockney,  
3 Rothco, all own in different places, and they all own in turn  
4 some other thing. So I don't know what each of them, off the  
5 top of my head, own. There's -- they're part of a myriad of  
6 corporate structures here.

7 Q Strak, Ltd. Do you know whether the Debtor owns more than  
8 20 percent of the equity of that entity?

9 A Stark? I don't know.

10 Q Okay. I don't know how to pronounce the next one. Eamis  
11 (phonetic) Ltd. Do you know whether the Debtor owns more than  
12 20 percent of that equity?

13 A Off the top of my head, I don't recall.

14 Q What about Maple Avenue Holdings, LLC?

15 A I believe, I don't know if it's directly or indirectly,  
16 that we own a hundred percent of that entity. But I'm not  
17 sure.

18 Q What about Highland Capital Management Korea, Ltd.?

19 A Effectively, Highland Capital Management is owned a  
20 hundred percent.

21 Q What about Highland Capital Management Singapore Pte.  
22 Ltd.?

23 A We are in the process of shutting it down, so I don't know  
24 that -- what the equity percentages are. It's really just a  
25 question -- it's -- it's dissolved save for a signature from a

Seery - Direct

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1 Singaporean.

2 Q Okay. But did the Debtor own more than 20 percent of that  
3 entity?

4 A I don't know the specific allocations of equity ownership.

5 Q Okay. What about Pennant (phonetic) Management, LP? Do  
6 you know whether the Debtor owns or owned more than 20 percent  
7 of that entity?

8 A I don't recall, no.

9 MR. RUKAVINA: You can take that exhibit down, Mr.  
10 Vasek.

11 BY MR. RUKAVINA:

12 Q Mr. Seery, very quick, are you familiar with Bankruptcy  
13 Rule 2015.3?

14 A I am, yes.

15 Q Okay. Has the Debtor filed any Rule 2015.3 statements in  
16 this case?

17 A I don't believe we have.

18 Q Okay.

19 MR. RUKAVINA: Thank you, Your Honor. I'll pass the  
20 witness.

21 THE COURT: All right. Any other Objector  
22 questioning? None from Mr. Taylor, none from Mr. Draper, none  
23 from Ms. Drawhorn?

24 All right. Any cross -- any examination from you, Mr.  
25 Morris?

Seery - Cross

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1 MR. MORRIS: Just one question.

2 THE COURT: Go ahead.

3 CROSS-EXAMINATION

4 BY MR. MORRIS:

5 Q Mr. Seery, do you know why the Debtor has not yet filed  
6 the 2015.3 statement?

7 A I have a recollection of it, yes.

8 Q Can you just describe that for the Court?

9 A When we -- when we initially filed, when the Debtor filed  
10 and it was transferred over, we started trying to get all the  
11 various rules completed. There are, as the Court is aware, at  
12 least a thousand and maybe more, more like three thousand,  
13 entities in the total corporate structure.

14 We pushed our internal counsel to try to get that done,  
15 and were never able to really get it completed. We did not  
16 have -- we were told we didn't have separate consolidating  
17 statements for every entity, and it would be difficult. And  
18 just in the rush of things that happened from the first  
19 quarter into the COVID into the year, we just didn't complete  
20 that filing. There was no reason for it other than we didn't  
21 get it done initially and I think it fell through the cracks.

22 MR. MORRIS: Nothing further, Your Honor.

23 THE COURT: All right. Anything further, Mr.  
24 Rukavina?

25 REDIRECT EXAMINATION

Seery - Redirect

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1 BY MR. RUKAVINA:

2 Q Mr. Seery, I appreciate that answer. But you never sought  
3 leave from the Bankruptcy Court to postpone the deadlines for  
4 filing 2015.3, did you?

5 A No. If it hadn't fallen through the cracks, it would have  
6 been something we recalled and we would have done something  
7 with it. But, frankly, it just fell off the -- through the  
8 cracks. We didn't deal with it.

9 Q Okay.

10 MR. RUKAVINA: Thank you, Your Honor. Thank you, Mr.  
11 Seery.

12 THE COURT: All right. Any other Objector  
13 examination?

14 Mr. Morris, anything further on that point?

15 MR. MORRIS: No, thank you, Your Honor. No further  
16 questions.

17 THE COURT: All right. Mr. Seery, thank you. You're  
18 excused once again from the witness stand.

19 (The witness is excused.)

20 THE COURT: Your next witness?

21 MR. SEERY: Thank you, Your Honor.

22 THE COURT: Uh-huh.

23 MR. RUKAVINA: Your Honor, I'll call Jason Post. Mr.  
24 Post, if you're listening, which I believe you are, if you'll  
25 please activate your camera.

Post - Direct

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1 THE COURT: Mr. Post, we do not see or hear you yet.

2 MR. RUKAVINA: Talk, Mr. Post, and I think it'll  
3 focus on you.

4 MR. POST: Yes. Can you hear me now?

5 THE COURT: We can hear you. We cannot see you yet.  
6 Could you say, "Testing, one, two; testing, one, two"?

7 MR. POST: Testing, one, two. Testing, one, two.

8 THE COURT: There you are. Okay. Please raise your  
9 right hand.

10 JASON POST, CERTAIN FUNDS AND ADVISORS' WITNESS, SWORN

11 THE COURT: All right. Thank you. You may proceed.

12 DIRECT EXAMINATION

13 BY MR. RUKAVINA:

14 Q Mr. Post, good morning. State your name for the record,  
15 please.

16 A Robert Jason Post.

17 Q How are you employed?

18 A I'm employed by NexPoint Advisors, LP.

19 Q What is your title?

20 A Chief compliance officer.

21 Q Were you ever employed by the Debtor here?

22 A Yes.

23 Q Between when and when? Approximately?

24 A I believe it was July of '08 through October of 2020.

25 Q What was your last title while you were employed at the

Post - Direct

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1 Debtor?

2 A Still chief compliance officer. For the retail funds.

3 Q Okay. Very, very quickly, what does a chief compliance  
4 officer do? Or what do you do?

5 A It's multiple things. Interaction with the regulators.

6 Adherence to prospectus and SAI limitations for the funds.

7 And then establishment of written policies and procedures to  
8 prevent and detect violations of the federal securities laws  
9 and then testing those on a frequent basis.

10 Q And I believe you mentioned you're the CCO for NexPoint  
11 Advisors and Highland Capital Management Fund Advisors. Are  
12 you also the CCO for any funds that they advise?

13 A Yes. For all the funds that they advise.

14 Q Okay. Does that include so-called retail funds?

15 A Yes. They're all retail funds.

16 Q What is a retail fund?

17 A It typically constitutes funds that are subject to the  
18 Investment Company Act of 1940, such as open-end mutual funds,  
19 closed-end funds, ETFs.

20 Q Obviously, you know who my clients are. Are any of my  
21 clients so-called retail funds that you just described?

22 A Yes.

23 Q Name them, please.

24 A You've got NexPoint Capital, Inc., Highland Income Fund,  
25 and NexPoint Strategic Opportunities Fund.

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1 Q Do those three retail funds hold any voting preference  
2 shares in the CLOs that the Debtor manages?

3 A Yes.

4 MR. RUKAVINA: Mr. Vasek, if you'll please pull up  
5 Exhibit 2.

6 Your Honor, I believe I have a stipulation with Mr. Morris  
7 that this exhibit can be admitted, so I'll move for its  
8 admission.

9 MR. MORRIS: No objection, Your Honor.

10 THE COURT: All right. Exhibit 2 will be admitted.  
11 And let's be clear. That appears at -- is it Docket No. --  
12 let's see. Is it 1673 that you have your -- no, no, no, no.  
13 1670? Is that where your exhibits are?

14 MR. RUKAVINA: No, Your Honor. It's 1863. I think  
15 we did an amended one because we numbered our exhibits instead  
16 of having seventeen Os and Ps. So it's 1863.

17 THE COURT: 1863? Okay. All right. There it is.  
18 Okay. Again, this is -- I'm sorry. I got sidetracked. What  
19 exhibit? It's Exhibit 2, is admitted. Okay.

20 MR. RUKAVINA: Thank you, Your Honor.

21 (Certain Funds and Advisors' Exhibit 2 is received into  
22 evidence.)

23 BY MR. RUKAVINA:

24 Q Real quick, Mr. Seery. What do these HIF, NSOF, NC, what  
25 do they stand for? Do they stand for the retail funds you

Post - Direct

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1 just named?

2 MR. SEERY: I don't think he meant me.

3 THE WITNESS: Yeah.

4 BY MR. RUKAVINA:

5 Q I'm sorry, Mr. Post. I didn't hear you.

6 A You addressed me as Mr. Seery.

7 Q Oh. I apologize. What do those initials stand for?

8 A The names of the funds that I mentioned.

9 Q Okay. And what do these percentages show?

10 A The percentages show the amount of shares outstanding and  
11 the preference shares that each of the respective funds hold  
12 of the named CLOs.

13 Q And those CLOs on the left there, those are the CLOs that  
14 the Debtor manages pursuant to agreements, correct?

15 A Yes. Those are some of them, correct.

16 Q Yes. The ones that the retail funds you mentioned have  
17 interests in, correct?

18 A Correct.

19 Q And what does the far-right column summarize or show?

20 A That would be the aggregate across the three retail funds.

21 Q In each of those CLOs?

22 A Correct.

23 Q Thank you.

24 MR. RUKAVINA: Mr. Vasek, you may pull this down.

25 BY MR. RUKAVINA:

Post - Direct

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1 Q Mr. Post, in the aggregate, how much do those three retail  
2 funds have invested in those CLOs, ballpark?

3 A I believe it's approximately \$130 million, give or take.

4 Q Is it closer to 140 or 130?

5 A A hundred -- I think it's 140, actually.

6 Q Okay. Thank you. Who controls those three retail funds?

7 A Ultimately, the board --

8 Q And what --

9 A -- of the funds.

10 Q What is -- what do you mean by the board? Do they have  
11 independent boards?

12 A Yes. They have a majority independent board, the funds  
13 do.

14 Q Do you report to that board?

15 A Yes.

16 Q Does Mr. Dondero sit on those boards?

17 A He does not.

18 Q Okay.

19 MR. RUKAVINA: I'll pass the witness, Your Honor.

20 Thank you, Mr. Post.

21 THE COURT: All right. Any other Objector  
22 examination of Mr. Post?

23 All right. Mr. Morris, do you have cross?

24 MR. MORRIS: Yes, Your Honor, I do.

25 THE COURT: Okay.

Post - Cross

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## CROSS-EXAMINATION

2 | BY MR. MORRIS:

3 | Q Mr. Post, can you hear me okay, sir?

4 A Yes, I can hear you.

5 Q Okay. Nice to see you again. When did you first join  
6 Highland?

7 A I believe it was July of '08.

8 Q So you've worked with the Highland family of companies for  
9 about a dozen years now; is that right?

10 A Yes.

11 Q And you were actually employed by the Debtor from 2008  
12 until October 2020; is that right?

13 | A      Correct.

14 Q And you left at that time and went to join Mr. Dondero as  
15 the chief compliance office of the Advisors; do I have that  
16 right?

17 A Yes. I transitioned to NexPoint Advisors shortly, I  
18 believe, after Mr. Dondero left, but I was already the named  
19 CCO for that entity.

20 Q Right, but your employment status changed from being an  
21 employee of the Debtor to being an employee of NexPoint; is  
22 that right?

23 | A      Correct.

24 Q And that happened shortly after Mr. Dondero resigned from  
25 the Debtor and went to NexPoint Advisors, correct?

Post - Cross

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1 A Correct.

2 Q Okay. You mentioned that the funds are controlled by  
3 independent boards; do I have that right?

4 A It's a majority independent board, correct.

5 Q Okay. There's no independent board member testifying in  
6 this hearing, is there?

7 A I --

8 MR. RUKAVINA: Your Honor, Mr. Post wouldn't know  
9 that, but I'll stipulate to that as a fact.

10 THE COURT: All right.

11 MR. MORRIS: Okay.

12 BY MR. MORRIS:

13 Q Did you -- do you speak with the board members from time  
14 to time?

15 A Yes.

16 Q Did you tell them that it might be best if they came and  
17 identified themselves and helped persuade the Court that they  
18 were, in fact, independent?

19 A They have counsel to assist them with that determination.  
20 I never mentioned anything along those line to them.

21 Q Okay. Can you tell me who the board members are?

22 A Yes. Ethan Powell, Bryan Ward, Dr. Bob Froehlich, John  
23 Honis, and then Ed Constantino. He is only a board member,  
24 though, for NSOF. NexPoint Strategic Opportunities Fund.

25 Q All right. Mr. Honis, is he -- has he been determined to

Post - Cross

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1 be an interested director, for purposes of the securities  
2 laws?

3 A Yes.

4 Q Okay. Mr. Froeh..., do you know much about his  
5 background?

6 A I believe he worked at Deutsche Bank and a couple of the  
7 other -- or maybe a couple of other investment firms in the  
8 past. And he also owns a minor league baseball team.

9 Q Do you know how long he served as a director of the funds?

10 A I don't know, approximately. I think maybe seven -- six,  
11 seven years.

12 Q Okay. How about Mr. Ward? Did Mr. Froehlich ever work  
13 for Highland?

14 A Not that I can recall.

15 Q Did Mr. Ward ever work for Highland?

16 A Not that I can recall.

17 Q Do you recall how long he's been serving as a director of  
18 the funds?

19 A Mr. Ward?

20 Q Yes.

21 A I believe -- I'd be -- I don't recall specifically. I  
22 think it's been, you know, 10 to 12 years, give or take.

23 Q He was a director when you got to Highland; isn't that  
24 right?

25 A He was on the board of directors.

Post - Cross

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1 Q Yeah. So fair to say that Mr. Ward has been a director  
2 since at least the mid to late oughts? 2005 to 2008?

3 A I'm sorry, you cut out. Late what?

4 Q The late oughts. Withdrawn. Is it fair to say that Mr.  
5 Ward's been a director of the funds since somewhere between  
6 2005 and 2008?

7 A Again, I don't recall specifically. You know, I joined  
8 the complex, the retail complex as the named CCO in 2015, and  
9 he had been serving in that role prior to that, and I believe  
10 it was for probably a period of five to seven years, so that  
11 sounds in line.

12 Q Did you have a chance to review Dustin Norris's testimony  
13 from the December 16th hearing?

14 A I did not.

15 Q Do you know -- are you aware that he testified at some  
16 length regarding the relationship of each of these directors  
17 to Mr. Dondero and Highland?

18 A I didn't review anything, so I don't know what he said or  
19 how long it took.

20 Q Do you know if Mr. Powell's ever worked for Highland?

21 A He has.

22 Q Do you know in what capacity and during what time periods?

23 A He was -- I think his last title was -- I believe was  
24 chief product strategist, I believe. And he was also the  
25 named PM for one of -- or, a suite of ETF funds. I think he

Post - Cross

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1 was last employed maybe --from my recollection, 2014,  
2 possibly. Or 2015. Somewhere around in there.

3 Q Okay. And to the best of your knowledge, did Mr. Dondero  
4 appoint Mr. Powell to be the chief product strategist?

5 A I don't -- I don't know. I wasn't involved in the  
6 decision for his appointment. I don't know how he attained  
7 that role.

8 Q To the best of your knowledge, did Mr. Dondero appoint Mr.  
9 Powell as the PM of the ETF funds?

10 A Again, I wasn't involved in that determination, but he  
11 probably would have had a role in making the determination on  
12 who was the PM, along with probably some other investment  
13 professionals.

14 Q Okay. And did Mr. Powell join the board of the funds  
15 before or after he left Highland around 2015?

16 A I can't recall specifically if he was already on the board  
17 or was an interested member, but I believe he, you know, I  
18 believe he joined shortly after he left.

19 Q Okay. So he went from being an employee and being a  
20 portfolio manager at Highland to being on the board of these  
21 funds. Do I have that right?

22 A Again, I can't recall specifically. He may have already  
23 been on the board as an interested board member. But, you  
24 know, I believe, you know, if that wasn't the case, he would  
25 have joined the board shortly after leaving.

Post - Cross

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1 Q And Mr. Ward, I think you said, has been on the funds' board since somewhere between 2005 and 2008. Does that sound right?

4 A I think that was a time frame you referenced, and I think 5 that was kind of in line, walking it back. But I don't recall 6 specifically when he joined.

7 Q And to the best of your knowledge, have the Advisors for 8 which you serve as the chief compliance officer managed the 9 Funds for which Mr. Ward has served as a director since the 10 time he became a director?

11 A I'm sorry. Can you repeat the question?

12 Q Yeah. I'm just trying to understand if the advisors -- 13 withdrawn. The Advisors manage the Funds; do I have that 14 right?

15 A They provide investment advice on behalf of the Funds.

16 Q And they do that pursuant to written agreements; do I have 17 that right?

18 A Correct.

19 Q And is it your understanding that, for the entire time 20 that Mr. Ward has served as a member of the board of the 21 Funds, the Advisors have provided the investment advice to 22 each of those Funds?

23 A Yes, in one form or fashion. I believe at one period in 24 time, historically, the Advisor may have changed its name, but 25 it would have been, you know, at the end of the day, one or

Post - Cross

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1 more -- one of either NexPoint Advisors or Highland Capital  
2 Management Fund Advisors would have advised those Funds.

3 Q Is it fair to say that each of the Advisors for which you  
4 serve as the chief compliance officer has always been managed  
5 by an Advisor owned and controlled by Mr. Dondero?

6 A I believe so, yes.

7 MR. MORRIS: I have no further questions, Your Honor.

8 THE COURT: All right. Any redirect?

9 MR. RUKAVINA: Yes.

10 THE COURT: Okay. Mr. Rukavina?

11 MR. RUKAVINA: Your Honor, was I on mute? I  
12 apologize.

13 THE COURT: Yes.

14 REDIRECT EXAMINATION

15 BY MR. RUKAVINA:

16 Q Mr. Post, why did you leave Highland?

17 A It -- because I was a HCMLP employee and it was --  
18 basically, there was conflicts that were created by being an  
19 employee of the Debtor and by also serving as the CCO to the  
20 named Funds and the Advisors, and it coincided with Jim  
21 toggling over from HCMLP to NexPoint. It just made sense more  
22 functionally and from a silo perspective for me to be the  
23 named CCO for that entity since he was no longer an employee  
24 of HCMLP.

25 Q And by Jim, you mean Jim Dondero?

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1 A Yes, sorry. Jim Dondero.

2 Q You're not some kind of lackey for Mr. Dondero, where you  
3 go wherever he goes, are you?

4 MR. MORRIS: Objection to the question.

5 THE WITNESS: No.

6 THE COURT: Overruled. He can answer.

7 MR. RUKAVINA: Okay.

8 THE WITNESS: No.

9 MR. RUKAVINA: Okay. Thank you, Your Honor. I'll  
10 pass the witness.

11 THE COURT: Any other Objector examination?

12 All right. Any recross, Mr. Morris?

13 RECROSS-EXAMINATION

14 BY MR. MORRIS:

15 Q Just one question, sir. The conflicts that you just  
16 mentioned, they were in existence for the one-year period  
17 between the petition date and the date you left; isn't that  
18 right?

19 A I think -- I believe so, and I think they became more  
20 evident as, you know, time progressed.

21 Q Okay. But they existed on day one of the bankruptcy  
22 proceeding; isn't that right?

23 A Yes, I believe so.

24 Q All right.

25 MR. MORRIS: No further questions, Your Honor.

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1           THE COURT: All right. Thank you, Mr. Post. You're  
2 excused from the virtual witness stand.

3           (The witness is excused.)

4           THE COURT: All right. Your next witness?

5           MR. RUKAVINA: Your Honor, my exhibit has been  
6 admitted, I promised I'd be short, and my evidentiary  
7 presentation is done. Thank you.

8           THE COURT: All right. Well, Mr. Taylor, your  
9 evidence?

10          MR. TAYLOR: First of all, given the testimony that  
11 we have received just recently, we have released Mr. Sevilla  
12 from his subpoena and are not going to call him.

13          With that being said, we do have some documents that we  
14 would like to get into evidence. We filed our witness and  
15 exhibit list at Docket No. 1874. I don't believe any of these  
16 are controversial. I'm trying to keep from duplicating those  
17 that are already into evidence by the Debtor. And therefore I  
18 would like to offer into evidence Exhibits No. 6 through 12  
19 and 17. And that is it, Your Honor.

20          THE COURT: Okay. Is there any objection to Dondero  
21 Exhibits 6 through 12 and 17, appearing at Docket 1874?

22          MR. MORRIS: I just want to be clear that Exhibits 6  
23 and 7, which are letters, I believe, from Mr. Lee (phonetic)  
24 are not being offered for the truth of the matter asserted in  
25 either letter.

1                   MR. TAYLOR: That is correct, Your Honor. Just  
2 merely that those requests and the words that were stated in  
3 there were indeed sent on those dates.

4                   MR. MORRIS: And the same comment, Your Honor, with  
5 respect to Exhibits 9 through 12, that those documents are not  
6 being offered for the truth of the matter asserted.

7                   MR. TAYLOR: Again, just that those requests were  
8 sent and those responses as stated were sent.

9                   And I apologize. I missed one, Your Honor. Also No. 15.  
10 6 through 12, 15, and 17.

11                  MR. MORRIS: Your Honor, the Debtor has no objection  
12 to Exhibits 15, 16, and 17.

13                  THE COURT: All right. So, so they are all admitted  
14 with the representation that 6 and 9 through 12 are not being  
15 offered for the truth of the matter asserted. With that  
16 representation, you have no objection, Mr. Morris?

17                  MR. MORRIS: That's right. I do just want to get  
18 confirmation that Exhibits 1 through 5 and 13 through 16 -- 13  
19 and 14 are not being offered at all.

20                  THE COURT: Mr. Taylor?

21                  MR. TAYLOR: So, that -- that is correct. 1 through  
22 5 would be duplicative of what has already been introduced  
23 into the record by Mr. Morris, so I am not offering those.  
24 And do not believe that 13 and 14 are relevant anymore, and so  
25 therefore did not offer those.

1           THE COURT: Okay. So, with that, I have admitted 6  
2 through 12, 15, 16, and 17 at Docket Entry 1874.

3           (Dondero Exhibits 6 through 12 and 15 through 17 are  
4 received into evidence.)

5           THE COURT: All right. Anything else, Mr. Taylor?

6           MR. TAYLOR: No, Your Honor. We are not calling any  
7 witnesses.

8           THE COURT: All right. Mr. Draper, what about you?  
9 Any evidence?

10          MR. DRAPER: No evidence or witnesses. The evidence  
11 that's been introduced by Mr. Taylor and Mr. Rukavina are  
12 sufficient for me.

13          THE COURT: All right. Ms. Drawhorn, anything from  
14 you?

15          MS. DRAWHORN: No additional evidence, Your Honor.

16          THE COURT: All right. Well, then, Mr. Morris, did  
17 you have anything in rebuttal?

18          MR. MORRIS: No, Your Honor. I think we can proceed  
19 to closing statements. I would just appreciate confirmation  
20 by the Objecting Parties that they rest.

21          THE COURT: All right. Well, I guess we'll get that  
22 clear if it is isn't clear. All of the Objectors rest.  
23 Confirm, yes, Mr. Rukavina?

24          MR. RUKAVINA: Confirm.

25          THE COURT: And Mr. Taylor?

1 MR. TAYLOR: Confirmed, Your Honor.

2 THE COURT: Okay. And Draper and Drawhorn?

3 MR. DRAPER: Yes, Your Honor.

4 MS. DRAWHORN: Confirmed, Your Honor.

5 THE COURT: All right. By the way, I assume Mr.  
6 Dondero has been participating this morning. I didn't  
7 actually get that clarification before we started. Mr.  
8 Taylor, is he there with you this morning?

9 MR. TAYLOR: Your Honor, he is. He has been  
10 participating. He is sitting directly to my left about  
11 slightly more than six feet apart.

12 THE COURT: Okay. All right. Good.

13 All right. Well, let's talk about our closing arguments  
14 and let me figure out, do we have -- should we break a bit  
15 before starting? I have an idea in my brain about a time  
16 limitation, but before I do that, let me ask. Mr. Morris,  
17 first I'll ask you. How much time do you think you need for a  
18 closing argument?

19 MR. MORRIS: Your Honor, --

20 MR. POMERANTZ: Your Honor?

21 MR. MORRIS: -- I'll defer to Mr. Pomerantz, who's  
22 going to deliver that portion of our presentation today.

23 THE COURT: All right. Mr. Pomerantz?

24 MR. POMERANTZ: Your Honor, I will be making -- yes,  
25 Your Honor. I will be making the majority portion of the

1 argument. Mr. Kharasch will be making the portion of the  
2 argument dealing with the Advisor and Funds' objection. But I  
3 expect my closing to be quite lengthy, given the 1129  
4 requirements, all the legal issues, which I plan to spend a  
5 fair amount of time. So I would anticipate a range of an hour  
6 and 45 minutes.

7 THE COURT: An hour and 45 minutes? All right.

8 Well, --

9 MR. POMERANTZ: Correct.

10 THE COURT: I'm getting an echo.

11 MR. CLEMENTE: Your Honor, it's Matt Clemente on  
12 behalf on the Committee. I'll have 15 minutes or less, Your  
13 Honor. Just some things I would like to touch on.

14 THE COURT: All right. So, two hours. If I were to  
15 --

16 MR. POMERANTZ: And then you need, Your Honor, to add  
17 Mr. Kharasch. I think he's on. He can indicate how long his  
18 part of the closing will be.

19 THE COURT: Mr. Kharasch?

20 MR. KHARASCH: Yes. I would figure my argument would  
21 probably be about 20 minutes to 30 minutes.

22 THE COURT: Okay.

23 MR. RUKAVINA: Your Honor, let me interject something  
24 that I think will help everyone out. With the CLOs having  
25 consented through their counsel to the assumption, the bulk of

1 my objection is now moot. We no longer can and will argue  
2 that the contracts are unassignable under 365(b) or (c)  
3 because we do have now their consent. So that will hopefully  
4 help the Debtor on that issue.

5 MR. KHARASCH: Your Honor, Ira Kharasch again. I was  
6 not anticipating that. I believe that that will take away the  
7 bulk of my argument. I'm still going to be dealing with some  
8 of the other non-assumption-type arguments raised by the CLO  
9 Objectors, kind of dovetailing with Mr. Pomerantz's arguments  
10 on the injunction. But that will greatly reduce, Your Honor,  
11 my argument.

12 THE COURT: All right. So if I say two hours of  
13 argument for the Debtor and Creditors' Committee, Rukavina,  
14 Taylor and Draper and Drawhorn, can you collectively manage to  
15 share that two hours? Have a two-hour argument in the  
16 aggregate? That seems fair to me.

17 MR. RUKAVINA: Your Honor, I think -- I think that's  
18 fine, Your Honor.

19 THE COURT: All right. And I guess I'll --

20 MR. TAYLOR: This is Mr. Taylor. And yes, I agree.

21 THE COURT: Okay. And Mr. Draper?

22 MR. DRAPER: This is Douglas Draper. I agree. I  
23 agree also, Your Honor.

24 THE COURT: All right. And I'm going to ask --

25 MR. POMERANTZ: Your Honor, I --

1 THE COURT: Go ahead.

2 MR. POMERANTZ: Your Honor, we -- I think we may need  
3 like two hours and ten minutes, because mine was 1:45, Mr.  
4 Clemente was 15, and then Mr. Kharasch. But we'll be around  
5 that. And I tend to speak fast, so I might even shorten mine.

6 THE COURT: Okay. You negotiated me up to two hours  
7 and ten minutes, Debtors/Objectors, each.

8 I'm going to ask one more time. The U.S. Trustee lobbed a  
9 written objection, but we've not heard anything from the U.S.  
10 Trustee. Are you out there wanting to make an oral argument?

11 MS. LAMBERT: Yes, Your Honor. The United States  
12 Trustee is on the line. And we've been listening to the  
13 hearing. I can turn my video on. I think you're --

14 THE COURT: Yes. I can hear you. I can't see you.

15 MS. LAMBERT: Okay. All right. And so the U.S.  
16 Trustee feels that the issues about the releases have been  
17 adequately joined and raised by the other parties and that  
18 it's an issue of law. The U.S. Trustee does not feel that we  
19 can add to that dialogue by, you know, wasting more of the  
20 Court's time. I think it's been adequately briefed and it's  
21 been adequately argued here today.

22 THE COURT: Okay.

23 MS. LAMBERT: And we do have an agreement to include  
24 governmental release language in the order. I understand that  
25 agreement is still being honored. That's a separate agreement

1 than the issue of whether the releases are precluded. But  
2 we're going to let the other people carry the water on that.

3 THE COURT: Okay.

4 MR. POMERANTZ: Yeah. And that is correct. That is  
5 correct, Your Honor. They asked for some information -- a  
6 provision on government releases. They also asked for a  
7 provision regarding joint and several liability for Trustee  
8 fees.

9 As I mentioned previously, the IRS has asked for a  
10 provision in the confirmation order, as have the Texas Taxing  
11 Authorities.

12 We have not uploaded a proposed confirmation order, but I  
13 will state right now on the record that, before we do so, we  
14 will, of course, give Ms. Lambert, Mr. Adams, and the Texas  
15 Taxing Authorities the opportunity to review. We expect there  
16 won't be any issue because the language has already been  
17 agreed to.

18 THE COURT: All right. Well, how about this. It's  
19 11:23 Central time. Let's break until 12:00 noon Central  
20 time, okay, so that gives everyone a little over 30 minutes to  
21 have a snack and get their notes together, and we'll start  
22 with closing arguments at 12:00 noon. All right? So we're in  
23 recess until then.

24 THE CLERK: All rise.

25 (A recess ensued from 11:24 a.m. until 12:05 p.m.)

1           THE COURT: All right. Please be seated. All right.  
2 This is Judge Jernigan. We are back on the record in  
3 Highland. Let me make sure we have the people we need. Do we  
4 have the Pachulski team there? Mr. Pomerantz, Mr. Kharasch?

5           MR. POMERANTZ: Yes, you do, Your Honor.

6           THE COURT: All right. For our Objectors, Mr.  
7 Taylor, are you there?

8           MR. TAYLOR: Yes, Your Honor, I am.

9           THE COURT: All right. I see Mr. Draper there on the  
10 video. You're there.

11          MR. DRAPER: I'm here. Can you hear me?

12          THE COURT: I can hear you loud and clear, yes.

13          MR. DRAPER: Great, because I didn't -- I'm not  
14 hearing, something so I apologize.

15          THE COURT: All right. So we have Mr. Rukavina, and  
16 I think I see Mr. Hogewood there as well. Is that correct?  
17 You're ready to go forward?

18          MR. RUKAVINA: Yes, Your Honor.

19          THE COURT: All right.

20          MR. RUKAVINA: Yes, Your Honor. Good afternoon.

21          THE COURT: All right. And Ms. Drawhorn, you're  
22 there?

23          MS. DRAWHORN: Yes, Your Honor.

24          THE COURT: Okay. Committee. Mr. Clemente, are you  
25 there?

1 MR. CLEMENTE: Yes, Your Honor. I'm here, Your  
2 Honor.

3 THE COURT: Okay. Very good. All right. So, let me  
4 reiterate. We've given two-hour and 10-minute time  
5 limitations for the Debtor, and that'll be both any time you  
6 reserve for rebuttal and your closing, initial closing  
7 argument. Mr. Clemente, you're going to be in that time frame  
8 as well. Okay?

9 MR. CLEMENTE: Yes, Your Honor.

10 THE COURT: And so, as supporters of the plan.

11 And then, of course, the Objectors, they have collectively  
12 two hours and ten minutes.

13 A couple of things. I'm going to have my law clerk, Nate,  
14 who you can't see but he's to my right, he's going to keep  
15 time. I promise I won't be a jerk and cut anyone off  
16 midsentence, but please don't push the limit if I say, you  
17 know, "Time."

18 The other thing I will tell you is I'll probably have some  
19 questions here or there. And I've told Nate, cut off the  
20 timer if we're in a question-answer session. I won't count  
21 that as part of the two hours and ten minutes.

22 All right. So, with that, Mr. Pomerantz, you may begin.

23 CLOSING STATEMENT ON BEHALF OF THE DEBTOR

24 MR. POMERANTZ: Thank you, Your Honor. As Your Honor  
25 is aware, the Debtor has been able to resolve all objections

1 to confirmation other than the objection by Mr. Dondero or his  
2 entities and the United States Trustee.

3 Your Honor, I have a very lengthy closing argument, given  
4 the number of issues that are raised in the objections, and I  
5 want to make a complete record, since I understand that  
6 there's a good likelihood that (garbled) appeal.

7 With that in mind, Your Honor, I'm prepared to go through  
8 each and every confirmation requirement in Section 1129.  
9 However, as an alternative, I might propose that I can go  
10 through each of the Section 1129 requirements that are the  
11 subject of pending objections or otherwise depend upon  
12 evidence that Your Honor has heard.

13 THE COURT: Okay.

14 MR. POMERANTZ: And of course, I'll be happy to  
15 answer any questions that you have in the process.

16 THE COURT: Okay.

17 MR. POMERANTZ: And after my closing argument, I will  
18 turn it over to Mr. Kharasch to address the Advisor and Funds'  
19 objections.

20 THE COURT: Okay.

21 MR. POMERANTZ: Before I walk the Court through the  
22 confirmation requirements, I did want to note for the Court,  
23 as I did previously, that we filed an updated ballot summary  
24 at Docket No. 1887. And as reflected in the summary, Classes  
25 2 and 7 have voted to accept the plan with the respective

1        numerosity and amounts required. In fact, the votes are a  
2        hundred percent.

3              Class 8, however, has voted to reject the plan. Seventeen  
4        creditors in Class 8 voted yes and 24 objectors, which are, I  
5        think, all but one the employees with one-dollar claims for  
6        voting purposes, voted against.

7              In dollar amount, Class 8 has accepted the plan by 99.8  
8        percent of the claims. And I will address the issues of the  
9        cram-down over that class a little bit later on.

10          Lastly, during the course of my presentation, I will  
11       identify for the Court certain modifications we have made to  
12       address the objections that were filed on January 22nd and  
13       then also on February 1st. And at the end of my presentation,  
14       I will raise a couple of other modifications that I won't get  
15       to during my presentation and will explain to the Court why  
16       all the modifications do not require resolicitation and are  
17       otherwise appropriate under Section 1127.

18          Your Honor, as Your Honor is aware, Section 1129 requires  
19       the Debtors to demonstrate to the court that the plan  
20       satisfies a number of statutory requirements. 1129(a)(1)  
21       provides that the plan requires -- complies with all statutory  
22       provisions of Title 11, and courts interpreted this provision  
23       as requiring the debtor to demonstrate it complies with  
24       Section 1122 and 1123.

25          With respect to classification, Your Honor, there has been

1 one objection that was raised to essentially a classification,  
2 and that was raised by Mr. Dondero to Article 3C of the plan  
3 on the grounds that it purports to eliminate a class that did  
4 not have any claims in it as of the effective date but which  
5 may later have a claim in that class.

6 I think he was primarily concerned about Class 9  
7 subordinated claims. But Mr. Dondero misunderstands the  
8 provision. It only eliminates a claim for voting purposes,  
9 and if there's later a claim in that class, it will be treated  
10 as the plan provides the treatment.

11 In any event, Class 9, as we know now, will be populated  
12 by the HarbourVest claims, as well as the UBS claims and the  
13 Patrick Daugherty claims, if the Court approves the settlement  
14 approving those claims.

15 Next, Your Honor, Section 1123(a) contains seven mandatory  
16 requirements that a plan must include. Sections 1, 2, and 3  
17 of 1123(a) apply to the classification of claims and where  
18 they're impaired and treatment. The plan does that.

19 There has been an objection to 1123(a)(3) raised by  
20 several parties with respect to the classification and  
21 treatment of subordinated claims. The concerns stem from the  
22 mistaken belief that the Debtor reserved the right to  
23 subordinate claims without providing parties with notice and  
24 without obtaining a court order.

25 The Debtor never intended to have unilateral ability to

1 subordinate claims without affording parties due process  
2 rights, and we've added some clarificatory language to so  
3 provide.

4 We made changes to the plan on January 22nd, and then on  
5 February 1st, and the plan addresses all those issues in  
6 Article 3(j) and it talks about when a claim is going to be  
7 subordinated as a non-creditor. We've also redefined the  
8 definition of subordinated claims to make clear that a claim  
9 is only subordinated upon entry of an order subordinating that  
10 claim.

11 Mr. Dondero also objected on the grounds that the plan did  
12 not contain a deadline pursuant to which the Debtor would be  
13 required to seek any subordination, and we have revised  
14 Article 7(b) of the plan to provide that any request to  
15 subordinate a claim would have to be made on or before the  
16 claim objection deadline, which is 180 days after the  
17 effective date.

18 Lastly, certain former employees, Mr. Yang and Borud,  
19 objection also joined by Mr. Deadman, Travers, and Kauffman,  
20 objected to the inclusion of language in the definition of  
21 "Subordinated Claims" that a claims arising from a Class A, B,  
22 or C limited partnership is deemed automatically subordinated.  
23 The concerns were that the language could broadly apply to any  
24 potential claims by a former partner, and could be also read  
25 to encompass claims outside the statutory scope of 510(b) or

1 otherwise relating to limited partnership interests.

2       While the Debtor does reserve the right to seek to  
3 subordinate the claims on any basis, we have modified the plan  
4 to address that concern and to address the concern that we're  
5 not attempting to create any new causes of action for  
6 subordination that don't otherwise exist under applicable law,  
7 but it just preserves the parties' rights with respect to  
8 subordination and deals with that at a later date.

9       Next, Your Honor, Section 1123(a)(5). I skipped over  
10 1123(a)(4) because there are no objections to that provision.

11       THE COURT: Okay.

12       MR. POMERANTZ: Section 1123(a)(5), a plan must  
13 provide for adequate means of implementation. And the plan  
14 provides a detailed structure and blueprint how the Debtor's  
15 operations will continue, how the assets will be monetized,  
16 including the establishment of the Claimant Trust,  
17 establishment of the Litigation Sub-Trust, the Reorganized  
18 Debtor, the Claimant Trust Oversight Board. And the documents  
19 precisely describing how this will occur were filed as part of  
20 the various plan supplements.

21       1123(a)(7), Your Honor, requires that the plan only  
22 contain provisions that are consistent with the interest of  
23 equity holders and creditors with respect to the manner,  
24 selection, and -- of any director, officer, or trustee under  
25 the plan. And as discussed in the plan, at the disclosure

1 statement, and as testified to by Mr. Seery, the Committee and  
2 the Debtor had arm's-length negotiations regarding the post-  
3 effective date corporate governance and believe that the  
4 selection of the claimant Trustee, the Litigation Sub-Trustee,  
5 and the Claimant Trust Oversight Board are in the best  
6 interest of stakeholders.

7 HCMFA has raised a particular objection, I think, to these  
8 issues, but I will address it in the context of the  
9 requirement under Section 1129(a)(5).

10 Your Honor, Section 1129(a)(2) requires that the plan  
11 comply with the disclosure and solicitation requirements under  
12 the plan. Section 1125 requires that the Debtor only solicit  
13 with a court-approved disclosure statement. The Court  
14 approved the disclosure statement on November 23rd, and  
15 pursuant to the proofs of service on file, the plan and  
16 disclosure statement were mailed, along with solicitation  
17 materials that the court approved.

18 Now, there has been an objection raised by Dugaboy, and  
19 also alluded to by Mr. Taylor in some of his comments before,  
20 that the plan does violate 1129(a)(2) because the Debtor's  
21 disclosure statement was deficient.

22 In support of that argument, Dugaboy points to the  
23 reduction in the anticipated distribution to creditors from  
24 the November plan analysis to the January plan analysis, and  
25 argues that that reduction requires resolicitation. However,

1 those arguments are not well-taken.

2       First, none of the people making these objections were  
3 solicited for their vote on the plan, or if they had been,  
4 they didn't vote or decided to reject the plan. And to the  
5 extent that Class 8 creditors, the distribution has gone down  
6 -- that's the class that Mr. Taylor and Mr. Draper are  
7 concerned about -- you don't hear the Committee, Acis,  
8 Redeemer, UBS, HarbourVest, Daugherty, or the Senior Employees  
9 making their argument, this argument, and they represent over  
10 99 percent of the claims in that class. And in fact, of the  
11 17 Class 8 creditors that have accepted the plan, 15 are  
12 represented by the parties I just mentioned.

13       So who are the two creditors that they're so concerned  
14 about? One is Contrarian, which is a claims trader that  
15 actually elected to be treated in Class 7, and one is one of  
16 the employees who voted to accept the plan.

17       Second, Your Honor, the argument conflates the difference  
18 between adverse change to the treatment of a claim or interest  
19 that would require a resolicitation under Section 1127 and a  
20 change to the distribution that would not.

21       More importantly, Your Honor, the argument is specious.  
22 As Mr. Seery testified yesterday, the material differences  
23 between the analysis contained on November and late January  
24 and the one we filed on February 1st were based on three types  
25 of changes: an update regarding the increased value of assets

1 based upon events that had transpired during this period,  
2 which included an increase in asset value, no recoveries, and  
3 revenues expected to be generated by the CLO management  
4 agreements; an update to the expected costs of the Reorganized  
5 Debtor and the Claimant Trust as a result of the continued  
6 evaluation of staffing needs, operational expenses, and  
7 professional fees; and an update to reflect resolution of the  
8 HarbourVest and UBS claims.

9       In the filing Monday, Your Honor, we updated the plan  
10 projection, a liquidation analysis which revised the unsecured  
11 claims based upon the UBS settlement that I was able to  
12 disclose to Your Honor. And in the filing, the distribution  
13 now revised to Class 8 creditors is now 71 percent, compared  
14 to the 87 percent that was in the disclosure statement that  
15 went out for solicitation.

16       Your Honor, there can be no serious argument that the  
17 creditors in this case were not fully aware of the potential  
18 for the UBS and HarbourVest creditors receiving claims. Your  
19 Honor's UBS 3018 order granting its claim for voting purposes  
20 was entered right around the time that the disclosure  
21 statement was approved. And, in fact, a last-minute addition  
22 to the disclosure statement disclosed the 3018 amount,  
23 although the amount did not make it to the attachment to the  
24 disclosure statement. And that reference, Your Honor, to the  
25 UBS claim being allowed for voting purposes can be found at

1 Page 41 of Docket No. 1473.

2 And the HarbourVest settlement was filed on about December  
3 23, two weeks before the voting deadline, sufficient time for  
4 people to take that into consideration.

5 And as Your Honor surely knows, the hearings in this case  
6 have been very well-attended by the major parties, and I  
7 believe that if we went back and looked at the records of who  
8 was on the WebEx system during the HarbourVest and UBS  
9 hearings, you would find that representatives of basically  
10 every creditor, every major creditor in this case in Class 8  
11 participated.

12 Moreover, Your Honor, creditors were not guaranteed any  
13 percentage recovery under the plan and disclosure statement,  
14 which clearly identified the size of the claims pool as a  
15 material risk.

16 Article 4(a)(7) of the disclosure statement, which is at  
17 Docket 1473, is entitled "Claims Estimation" and warns  
18 creditors that there can be no assurances that the Debtor's  
19 claims estimates will prove correct, and that the actual  
20 amount of the allowed claims may vary materially.

21 And if Dugaboy is arguing it was misled as the holder of a  
22 disputed administrative claim and general unsecured claim,  
23 that argument is simply preposterous.

24 Dugaboy cites several cases for the proposition that  
25 deficient disclosure may warrant resolicitation, and the

1 Debtor agrees with the proposition as a general matter. But  
2 if one looks at the cases that were filed -- that Dugaboy  
3 cited to, it will see that they are clearly inapposite and  
4 distinguishable.

5       *In re Michaelson*, the Bankruptcy Court for the Eastern  
6 District of California, revoked confirmation because the  
7 debtor failed to disclose in the disclosure statement a mail  
8 fraud indictment of the turnaround specialist who was to lead  
9 the reorganization effort and a prior Chapter 7 company he  
10 drove into the ground.

11       In *In re Brotby*, the Ninth Circuit BAP affirmed a decision  
12 of the Bankruptcy Court that the individual debtor's decision  
13 to modify its financial projections on the eve of confirmation  
14 did not require a resolicitation. And there, the financial  
15 projections were off by 75 percent.

16       And in *Renegade Holdings*, the Bankruptcy Court granted a  
17 motion by a group of states to revoke confirmation by the  
18 debtors, who manufactured and distributed tobacco products,  
19 because the debtors failed to disclose in its disclosure  
20 statement that the debtor and its principals were under  
21 criminal investigation for unlawful trafficking in cigarettes,  
22 which was not disclosed to creditors.

23       Your Honor, none of these cases are remotely analogous to  
24 this case, and they certainly do not stand for the proposition  
25 that the Debtor was required to resolicit.

1       Next, Your Honor, the next requirement is 1129(a)(3),  
2 which requires that any plan be proposed in good faith. As  
3 Mr. Seery testified at length, and the Court has personal  
4 knowledge of, having presided over this case for a year, the  
5 plan is the result of substantial arm's-length negotiations  
6 with the Committee over a period of several months.

7       Mr. Seery testified yesterday that, soon after the board  
8 was appointed, the Committee wanted to immediately pursue down  
9 the path of an asset monetization plan. However, as Mr. Seery  
10 testified, the board decided that it was inappropriate to rush  
11 to judgment and that it should consider all potential  
12 restructuring alternatives for the Debtor. And Mr. Seery  
13 testified what those alternatives were: a traditional  
14 restructuring and continuation of the Debtor's business; a  
15 potential sale of the Debtor's assets in one or more  
16 transactions; an asset monetization plan like the one before  
17 the Court today; and, last but not least, a grand bargain plan  
18 that would involve Mr. Dondero sponsoring the plan with a  
19 substantial equity infusion.

20       As Mr. Seery testified, by the early summer of 2020, the  
21 Debtor decided that it was appropriate to start moving down  
22 the path of an asset monetization plan while it continued to  
23 work on the grand bargain plan. Accordingly, Mr. Seery  
24 testified that the Debtor commenced good-faith negotiations  
25 with the Committee regarding the asset monetization plan, and

1 that those negotiations took several months, were hard-fought  
2 and at arm's-length, and involved substantial analysis of the  
3 appropriate post-confirmation corporate structure, governance,  
4 operational, regulatory, and tax issues. And on August 12th,  
5 Your Honor, the plan was filed with the Court.

6 And although the Debtor at that time had not reached an  
7 agreement with the Committee on some of the most significant  
8 issues, Mr. Seery testified that the independent board  
9 believed that it was important to file that plan at that time,  
10 a proverbial stake in the ground to act as a catalyst for  
11 reaching a consensual plan with the Committee or others, which  
12 it has done.

13 As Mr. Seery testified, he continued to work with Mr.  
14 Dondero to try to achieve a grand bargain plan, while at the  
15 same time proceeding down the path of the filed plan.

16 He testified that the parties participated in mediation at  
17 the end of August and early September to try to reach an  
18 agreement on a grand bargain plan, but were unsuccessful. And  
19 the Debtor proceeded on the path of the August 12th plan and  
20 sought approval of its disclosure statement on August 27th,  
21 2020.

22 Mr. Seery testified that, at that time, the Debtor still  
23 had not reached an agreement with the Committee on certain  
24 significant issues involving post-confirmation governance and  
25 the scope of releases. And as a result, after a contested

1 hearing, Your Honor, Your Honor did not approve the disclosure  
2 statement on October 27th, but asked us to go back again to  
3 try to work out the issues, and we came back on November 23rd.

4 Mr. Seery testified that the Debtor continued to negotiate  
5 with the Committee to resolve the material disputes leading --  
6 which led up to the November 23rd hearing, where we came in  
7 with the support of the Committee. But as Mr. Seery has also  
8 testified, he has continued to try to reach a consensus on a  
9 global plan, notwithstanding the approval of the disclosure  
10 statement. And he spent personally several hundred hours  
11 since his appointment trying to build consensus.

12 As part of this process, Mr. Seery testified that Mr.  
13 Dondero received access to substantial information regarding  
14 the Debtor's assets and liabilities, most recently in  
15 connection with a series of informal document requests which  
16 were made at the end of December.

17 And after the Court asked the parties to again reengage in  
18 efforts to try to reach a global hearing after the Debtor's  
19 preliminary injunction motion, Mr. Seery testified that he and  
20 the board participated in calls with Mr. Dondero and his  
21 advisors and the Committee to see if common ground could be  
22 attained.

23 Unfortunately, as Mr. Seery testified, the Committee and  
24 Mr. Dondero were not able to reach an agreement.

25 Accordingly, Your Honor, the testimony unequivocally and

1       overwhelmingly demonstrates that the plan was proposed in good  
2       faith.

3           I expect the Objectors may argue in closing that they have  
4       filed a plan under seal that is a better alternative than that  
5       being proposed by the plan that the Debtor seeks to confirm.  
6       Your Honor, as a threshold matter, yesterday I said any  
7       mention of the specifics of the recent plan would be  
8       inappropriate. We are not here today to debate the merits of  
9       Mr. Dondero's plan, which the Court permitted him to file  
10      under seal. He had ample opportunity to file this plan after  
11      exclusivity was terminated, seek approval of a disclosure  
12      statement, and, if approved, solicit votes in connection with  
13      a confirmation hearing, but he failed to do so.

14           What matters today, Your Honor, is whether the Debtor's  
15      plan, the plan that has been accepted by 99.8 percent of the  
16      amount of creditors, and opposed only by Mr. Dondero, his  
17      related entities, and certain employees, meets the  
18      confirmation requirements of Section 1129, which we most  
19      certainly argue it does.

20           And perhaps most importantly, Your Honor, the Court  
21      remarked at the last hearing that, without the Committee's  
22      support for a competing plan, Mr. Dondero's plan would be dead  
23      on arrival. And as you have heard from Mr. Clemente, Mr.  
24      Dondero does not yet have the Committee's support.

25           Next, Your Honor, is Section 1129(a)(5). That requires

1 that the plan disclose the identity of any director,  
2 affiliate, officer, or insider of the debtor, and such  
3 appointment be consistent with the best interest of creditors  
4 and equity holders. Courts have held that this section  
5 requires the disclosure of the post-confirmation governance of  
6 the reorganized entity.

7 HCMFA objects to the plan, arguing that it did not comply  
8 with Section 1129(a)(5) because it didn't disclose the people  
9 who would control and manage the Reorganized Debtor and who  
10 might be a sub-servicer. HCMFA's objection is off-base.  
11 Under the plan, Mr. Seery will be the claimant Trustee and  
12 Marc Kirschner will be the Litigation Trustee. Mr. Seery  
13 testified extensively about his background, and he has  
14 appeared before the Court many times and the Court is familiar  
15 with him. We have also introduced his C.V. into evidence.

16 As he testified, he will be paid \$150,000 per month,  
17 subject to further negotiations with the Claimant Trust  
18 Oversight Committee regarding the monthly amount and any  
19 success fee and severance fee, which negotiation is expected  
20 to be completed within the 45 days following the effective  
21 date.

22 Mr. Seery also testified regarding the names of the  
23 members of the Claimant Trust Oversight Committee, which  
24 information was also contained in the plan supplement and it  
25 generally includes the four members of the Committee and David

1 Pauker, a restructuring professional with decades of  
2 restructuring experience.

3 The members of the Oversight Committee will serve without  
4 compensation, except for Mr. Pauker, who Mr. Seery testified  
5 will receive \$250,000 in the first year and \$150,000 for  
6 subsequent years.

7 As set forth in the Claimant Trust agreement, if at any  
8 time there is a vacant seat to be filled by another  
9 independent member, their compensation will be negotiated by  
10 and between the Claimant Trust Oversight Board and them.

11 Mr. Seery has also testified that he believed the Claimant  
12 Trust will have sufficient personnel to manage its business.  
13 Specifically, he has testified that he intends to employ  
14 approximately ten of the Debtor's employees, who will be  
15 sufficient to enable him to continue to operate the Debtor's  
16 business, including as an advisor to the managed funds and the  
17 CLOs, until the Claimant Trust is able to effectively and  
18 efficiently monetize its assets for fair value, whether that  
19 takes two years or whether that takes 18 months or whether  
20 that takes longer.

21 Mr. Seery further testified that he believes that the  
22 operations can be best conducted by the Debtor's employees.  
23 And while he did consider the retention of a sub-servicer, he  
24 ultimately decided, in consultation with the Committee, that  
25 the monetization would be a lot more effective if done with a

1 subset of the Debtor's current employees.

2       The proposed corporate governance is also consistent with  
3 the interests of the Debtor and its stakeholders. The Court  
4 is very familiar with Mr. Seery and the Debtor, and I believe  
5 that Mr. Clemente, when he comments, will say the Committee  
6 can think of no better person to continue managing the  
7 Claimant Trust than Mr. Seery.

8       Mr. Kirschner is also well qualified to be the Litigation  
9 Trustee. His C.V. is part of the evidence that's been  
10 admitted and contains additional information regarding his  
11 background. And he will receive \$40,000 a month for the first  
12 three months and \$20,000 a month thereafter, plus a to-be-  
13 negotiated success fee.

14       There just simply can be no challenge to Mr. Seery's or  
15 Mr. Kirschner's qualifications or abilities to act in a manner  
16 contemplated by the plan or that their involvement is not in  
17 the best interest of the estate and its creditors.

18       Your Honor, the next requirement that is objected to is  
19 Section 1129(a)(7). That, of course, requires the Debtor to  
20 demonstrate that creditors will receive not less under the  
21 plan than they would receive if the Debtor was to be  
22 liquidated in Chapter 7. And on February 1st, Your Honor, we  
23 filed our updated liquidation analysis, which contains the  
24 latest-and-greatest evidence to support that.

25       These documents, the updated documents, in connection with

1 the prior analysis, was provided to objecting parties in  
2 advance of the January 29th deposition, and Your Honor has  
3 heard the differences between the January 29th and the  
4 February 1st documents being very minimal.

5 The Court heard extensive evidence and testimony from Mr.  
6 Seery regarding the assumptions that went into the preparation  
7 of the liquidation analysis and the differences of what  
8 creditors are projected to receive under the plan as compared  
9 to what they are projected to receive in a Chapter 7.

10 Such testimony also included a comparison between the  
11 liquidation analysis that was filed with the plan in November,  
12 the updated liquidation analysis filed on the -- or, provided  
13 to parties on January 28th, and the last version, filed on  
14 February 1st.

15 Mr. Seery testified that, on the revenue side, the  
16 liquidation analysis was updated to include the HCLOF  
17 interest, which was required as part of the settlement with  
18 HarbourVest; the increase in value of certain assets,  
19 including Trussway; revenue expected to be generated from  
20 continued management of the CLOs; and increased recovery on  
21 notes as a result of the acceleration of certain related  
22 notes.

23 On the expense side, Mr. Seery testified regarding his  
24 best estimate of the likely expenses to be incurred by a  
25 Chapter 7 trustee -- by the Claimant Trust, including

1 personnel costs; professional costs, which increase because of  
2 the litigious nature this case has become; and operating  
3 expenses.

4 And lastly, on the claim side, Your Honor, Mr. Seery  
5 testified that the claims numbers have been updated to include  
6 the settlement from HarbourVest and initially the amount  
7 approved to UBS pursuant to the 3018 order and then the  
8 reduction at \$50 million based upon the settlement announced.  
9 And like the prior liquidation analysis, the current analysis  
10 demonstrates that creditors will fare substantially better  
11 under in Chapter -- under the plan than in Chapter 7. In  
12 fact, the projected recovery under the plan is 85 percent for  
13 Class 7 creditors and 71.32 percent for Class 8 creditors, as  
14 compared to 54.96 percent for all unsecured creditors in a  
15 Chapter 7.

16 Mr. Seery also testified that expenses are expected to be  
17 more under Chapter 11 than under Chapter 7, but he also  
18 testified that the tens of millions of dollars in greater  
19 revenue and asset recoveries under the plan will more than  
20 offset the additional expenses.

21 As a result, the Court has more than sufficient  
22 evidentiary basis to conclude that the Debtor has carried its  
23 burden to prove that it meets the best interest of creditors  
24 best.

25 But Mr. Dondero's counsel spent a lot of time crossing --

1 cross-examining Mr. Seery, in a vain attempt to demonstrate to  
2 the Court that a Chapter 7 actually would be much better for  
3 creditors. And this argument has also been made by Dugaboy  
4 and the Advisors and the Funds.

5 Before I address these arguments on its merits, Your  
6 Honor, I just wanted to remind the Court of the Objectors --  
7 these Objectors' interest in this case. Mr. Dondero owns no  
8 equity in the Debtor. He owns a general partner. Strand, in  
9 turn, owns a quarter-percent -- a quarter of one percent of  
10 the total equity in the Debtor. And Mr. Dondero's claim, it's  
11 only a claim for indemnification. Dugaboy asserts two claims:  
12 a frivolous administrative claim relating to the postpetition  
13 management of a Multi-Strat, which, as an administrative  
14 claim, if it's valid, would not even be affected by the best  
15 interest of creditors test, because it would have to be paid  
16 in full. And he also asserts a claim that the Debtor's  
17 subsidiary -- against the Debtor's subsidiary for which it  
18 tries to pierce the corporate veil.

19 Just think about it. Dugaboy, Mr. Dondero's entity, is  
20 arguing that he should be able to pierce the corporate veil to  
21 get at the entity that was his before the bankruptcy.

22 Dugaboy's only other interest in this case relates to a --  
23 a one -- point eighteen and several-hundredths percent of the  
24 equity interest of the Debtor, and that is out of the money.

25 And as I mentioned previously, Your Honor, Mr. Rukavina's

1 clients either didn't file any general unsecured claims or  
2 filed them and withdrew them. Their only claim is a disputed  
3 administrative claim against the Debtor that was filed a week  
4 ago and which, at the appropriate time, the Debtor will  
5 demonstrate is without merit.

6 And I understand that, just today, NexPoint Advisors also  
7 filed administrative claim.

8 So I'm not going to argue to Your Honor that these parties  
9 do not have standing, although their standing is tenuous, at  
10 best, to assert this argument. The Court should keep their  
11 relative interests in mind when evaluating the merits and the  
12 good faith of this objection.

13 The principal objection, as I said, is that creditors will  
14 do better in a Chapter 7. Essentially, they argue that a  
15 Chapter 7 trustee can liquidate the assets just as well as Mr.  
16 Seery can and not require the cost structure that is included  
17 in the Debtor's plan projections. Yes, they argue that a  
18 Chapter 7 will be more efficient.

19 Mr. Seery's testimony, the only testimony on the topic,  
20 however, establishes that this preposterous proposition has no  
21 basis in reality. Mr. Seery testified that a Chapter 7  
22 trustee's mandate would be to reduce Debtor's assets as fast  
23 as possible, while he will monetize assets as and when  
24 appropriate to maximize the value.

25 But even if you can assume that the Chapter 7 trustee

1 could get court authority in a Chapter 7 to operate, there are  
2 several reasons Mr. Seery testified why a liquidation by a  
3 Chapter 7 trustee would be far worse than the plan.

4 First, Your Honor, no matter how competent the Chapter 7  
5 trustee is -- and Mr. Seery did not say he is more competent  
6 than anyone else out there -- the lack of a learning curve  
7 that Mr. Seery established through the 13 months in this case  
8 puts Mr. Seery at such a major advantage compared to a Chapter  
9 7 trustee.

10 Second, Mr. Seery questioned whether the Chapter 7 trustee  
11 would be able to retain the Debtor's existing professionals,  
12 even assuming they were willing to be retained. I'm not sure  
13 what's the Court's practice or the practice in the Northern  
14 District, but in many districts around the country debtor's  
15 counsel and professionals cannot be retained by Chapter 7  
16 trustee, as general counsel, at least.

17 And I could just imagine, Your Honor, Mr. Dondero's  
18 position if the Chapter 7 trustee actually sought to hire  
19 Pachulski Stang and DSI.

20 Third, Your Honor, regardless of whether the Chapter 7  
21 trustee obtained some operating authority, the market  
22 perception will be that a Chapter 7 trustee will sell assets  
23 for less value than would Mr. Seery as claimant Trustee. Mr.  
24 Seery testified to that.

25 The argument that the Objectors make that a Chapter 7

1 process, whereby the trustee would seek court approval of  
2 assets, is better for value than a process overseen by the  
3 Claimant Trust Board lacks any evidentiary basis and also is  
4 contradicted by Mr. Seery's testimony.

5 In fact, Mr. Seery testified that the Chapter 7 process,  
6 the public process of it, would very likely result in less  
7 recovery than a sale conducted in the Claimant Trust.

8 And lastly, Mr. Seery testified that it's unlikely that  
9 the ten or so valuable employees who Mr. Seery is planning to  
10 heavily rely on to assist him with post-confirmation would  
11 agree to a work for Chapter 7 trustee. Your Honor is all too  
12 familiar with the fights in the Acis case and Chapter 7  
13 trustee, and it's just hard to believe that any of the  
14 Highland employees would go work for the Chapter 7 trustee.

15 So why is Mr. Dugaboy -- why is Dugaboy and Mr. Dondero  
16 actually making this objection and advocating for a Chapter 7?  
17 It's because they would expect to buy the Debtor's assets on  
18 the cheap from a Chapter 7 trustee, exactly what they've been  
19 trying to do in this case.

20 Your Honor, moving right now to Section 1129(a)(11), that  
21 requires the debtor to demonstrate that the plan is feasible.  
22 In other words, it's not likely to be followed by a further  
23 liquidation or restructuring. Under the Fifth Circuit law,  
24 the debtor need only demonstrate that the plan will have a  
25 reasonable probability of success to satisfy the feasibility

1 requirement, and the Debtor has easily met this standard.

2 As Mr. Seery testified, the Debtor's plan contemplates  
3 continued operations through which time the assets will be  
4 monetized for the benefit of creditors. The plan contemplates  
5 that Class 7 creditors will be paid off shortly after the  
6 effective date. Class 8 creditors are not guaranteed any  
7 recovery but will receive pro rata distributions over a period  
8 of time. Class 2, Frontier secured claim, will be paid off  
9 over time, and the projections demonstrate that it will -- the  
10 Debtor will have money to do so.

11 Mr. Seery testified at length regarding the assumptions  
12 that went into the preparation of the projections most  
13 recently filed on February 1, and based on that testimony, the  
14 Debtor has clearly demonstrated that the plan is feasible.

15 Your Honor, I think that brings us to Section 1129(b). Of  
16 course, again, Your Honor, if Your Honor has any other  
17 questions with the sections I'm skipping over. I believe  
18 we've adequately covered them in the briefs and I don't think  
19 there's any objection.

20 But as I mentioned before, we have three classes that have  
21 voted to reject the plan. Class 8 is the general unsecured  
22 claims. They voted to reject the plan. Yes. Even though,  
23 based upon the ballot summary, 99 percent of the amount of  
24 claims in that class voted to accept the plan, approximately  
25 24 employees voted to reject the plan. And accordingly, the

1 Debtor cannot satisfy the numerosity requirement of Section  
2 1126(c).

3 I do want to briefly recount for Your Honor Mr. Seery's  
4 testimony regarding the nature of the claims of the 24  
5 employees who voted to reject the plan. And I'm not doing  
6 this to argue that the votes from these contingent creditors  
7 are not valid or that the Debtor doesn't need to satisfy the  
8 cram-down requirements. The Debtor understands it needs to  
9 demonstrate to the Court that Section 1129(b) is satisfied for  
10 the Court to confirm the plan.

11 Rather, why I do this, Your Honor, is to provide the Court  
12 with context about the nature and extent of the creditors in  
13 this class as the Court determines whether the plan is, in  
14 fact, fair and equitable and can be crammed down to a  
15 dissenting vote.

16 Mr. Seery testified that these employees originally had  
17 claims under the annual bonus plan and the deferred  
18 compensation plan. And as he testified, in order for claims  
19 under each of those plans to vest -- I think he referred to  
20 them as be-in-the-seat plans -- the employee was required to  
21 remain employed as of that date.

22 Mr. Seery testified that the Debtor terminated the annual  
23 bonus plan in the middle of January and replaced it with the  
24 key employee retention plan that the Court previously  
25 approved.

1       Accordingly, Mr. Seery testified that no employee who  
2 voted to reject the plan anymore has a claim on the annual  
3 bonus plan. He also testified that, with respect to the  
4 deferred compensation plan, people have contingent claims  
5 under that plan and that no payments are due until May 20 --  
6 2021.

7       As Mr. Seery testified, if the employees who would be  
8 entitled to receive payments under the deferred compensation  
9 plan do not agree to enter into a separation agreement that  
10 was approved by the Court, they will be terminated before May  
11 and there will no -- not longer be any deferred compensation  
12 due.

13       Accordingly, while the 24 employees who voted to reject  
14 the plan do technically have claims at this time they have  
15 voted, Mr. Seery testified the claims will go away soon.

16       I do want to point out something that's obviously  
17 painfully obvious at this point, that while Class 8 voted to  
18 reject the plan, the Committee, the statutory fiduciary for  
19 all unsecured creditors, supports the plan enthusiastically  
20 and I believe it does so unanimously.

21       The other classes to reject the plan, Your Honor, are  
22 Class 11, the A limited partnerships, and none of the holders  
23 in Class B and C limited partnerships voted on the plan, so  
24 cram-down is required over those classes as well. So Your  
25 Honor is able to confirm the plan pursuant to the cram-down

1 procedures under 1129(b) if the Court determines that the plan  
2 is fair and equitable and does not discriminate unfairly  
3 against the rejecting classes.

4 Let's first turn to the fair and equitable requirement. A  
5 plan is fair and equitable if it follows the absolute priority  
6 rule, meaning that if a class does not receive payment in  
7 full, no junior class will receive anything under the plan.  
8 With respect to Class 8, no junior class -- junior class to  
9 Class 8 will receive payment, and here is the key point,  
10 unless Class 8 is paid in full, with appropriate interest.  
11 NPA and Dugaboy -- Dugaboy in a brief filed on Monday -- argue  
12 that the plan does not satisfy the absolute priority rule  
13 because Class 10 and Class Equity Interests have a contingent  
14 right to receive property under the plan.

15 Your Honor, this argument misunderstands the absolute  
16 priority rule. Class 10 and Class Creditors will only receive  
17 payment after distribution to 8 and 9, the unsecured claims  
18 and the subordinated claims, are all paid in full, plus  
19 interest.

20 And, in fact, Dugaboy, in its brief, to its credit, admits  
21 that the argument is contrary to the Bankruptcy Court's  
22 decision of Judge Gargotta in the Western District case of *In*  
23 *re Introgen Therapeutics*. There, the Court was faced with a  
24 similar argument by a group of unsecured creditors who argued  
25 that the debtor's plan violated the absolute priority rule

1 because equity was retaining a contingent interest that would  
2 only be payable if general unsecured claims were paid in full.

3       In rejecting the argument, the Court reasoned, and I  
4 quote, "The only way Class 4 will receive anything is if Class  
5 3, in fact, gets paid in full, in satisfaction of  
6 1129(b) (2) (B) (i)," meaning that the absolute priority rule  
7 would not be an issue. If Class 3 is not paid in full, Class  
8 4's property interest is not -- is just -- is not just  
9 valueless, it just doesn't exist.

10       Your Honor, this is precisely the situation in this case.  
11 Equity interests will only receive a recovery if Class 8 and 9  
12 are paid in full.

13       But Dugaboy attempts to escape the logical reading of the  
14 absolute priority rule by claiming that *Introgen* was wrongly  
15 decided and goes against the Supreme Court's decision in  
16 *Ellers* (phonetic). Dugaboy argues that because the Supreme  
17 Court decided that property given to a junior class without  
18 paying a senior class in full is property, even if it's  
19 worthless.

20       But Dugaboy misses the point. Like the debtor in the  
21 *Introgen*, the Debtor here is not arguing that the property --  
22 the absolute priority rule is not violated because the  
23 contingent trust is worthless. Rather, the argument is that  
24 the absolute priority rule is not violated; it's, in order to  
25 receive anything on account of the junior -- of the equity,

1 the senior creditors have to be paid a hundred percent plus  
2 interest.

3 In fact, Your Honor, if the plan just didn't give any  
4 recovery to the equity Class 10 and 11, I bet you Dugaboy and  
5 Mr. Dondero would be arguing that it violated the absolute  
6 priority rule because senior classes, unsecured creditors,  
7 could potentially receive more than a hundred percent of their  
8 interest. And there's a case in the Southern District of  
9 Texas, *In re MCorp*, where the Bankruptcy Court said that for a  
10 plan to be confirmed, its stockholders eliminated, creditors  
11 must not receive more than payment in full.

12 Excess proceeds, Your Honor, if any, have to go somewhere.  
13 They can't go to creditors, so they have to go to equity. And  
14 the absolute priority rule is not violated.

15 And how is Dugaboy harmed? They say they may want to buy  
16 the contingent interests, and the lack of a marketing effort  
17 violates the *LaSalle* opinion as well. And who holds the Class  
18 B and Class C partnership interests that come before Dugaboy  
19 that Dugaboy is concerned may have this opportunity rather  
20 than them? Yes, it's Hunter Mountain, Your Honor, an entity,  
21 like Dugaboy, that's owned and controlled by Mr. Dondero.

22 Accordingly, the argument that the plan violates the  
23 absolute priority rule is actually a frivolous argument.

24 Turning now to unfair discrimination, Your Honor, Dugaboy  
25 argued in its brief Monday that because the projected

1 distribution to unsecured creditors has gone down in the  
2 recent plan projections, the discrepancy between Class 7 and  
3 Class 8 is so large that that amounts to unfair  
4 discrimination.

5 Again, the Court should first ask why is Dugaboy even the  
6 right party to be making the objection. Its claim against the  
7 Debtor to pierce the corporate veil, as I mentioned, is  
8 frivolous. It's subject to objection. It didn't even bother  
9 to have the claim temporarily allowed for voting purposes, as  
10 did other creditors who thought they had a valid claim. Yet  
11 this is another example of Mr. Dondero, through Dugaboy,  
12 trying to throw as many roadblocks in front of confirmation as  
13 he can.

14 But this argument, like the other ones, fails as well.  
15 Class 8 contains the general unsecured creditor claims,  
16 predominately litigation claims that have been pending against  
17 the Debtor for years. The Debtor was justified in treating  
18 the other unsecured creditors differently.

19 Class 6 consists of the PTO claims in excess of the cap,  
20 which are of different quality and nature than the other  
21 claims.

22 Class 7 consists of the convenience class. And it's  
23 appropriate to bribe convenience class creditors with a  
24 discount option for smaller claims to be cashed out for  
25 administrative convenience.

1       Mr. Seery testified that when the plan was formulated, the  
2 concept was to separately classify liquidated claims in small  
3 amounts in Class 7 and unliquidated claims in Class 8. Mr.  
4 Seery also testified that there's a valid business  
5 justification to treat the -- hold business 7 -- Class 7  
6 claims differently. These creditors had a reasonable  
7 expectation of getting paid promptly, as compared to  
8 litigation creditors, who would expect to be paid over time.

9       As the Court is aware, the litigation claims in Class 8  
10 involve litigation that has been pending for several years in  
11 the case of Acis, Daugherty, Redeemer, and more than a decade  
12 in UBS.

13       And most importantly, as Mr. Seery testified, the  
14 Committee and the Debtor had significant negotiation regarding  
15 the classification and treatment provisions of the plan for  
16 Class 7.

17       The Committee does have one constituent who is a Class 7  
18 creditor. However, the other three creditors are all in Class  
19 8 and hold claims in excess of \$200 million and supported the  
20 separate classification and the different treatment.

21       So, Your Honor, discrimination, different treatment among  
22 Class 7 and 8 is appropriate, and the different treatment is  
23 not unfair. In the February 1 projections, the Class 8  
24 creditors are estimated to receive 71.32 percent of their  
25 claims, but that's just an estimate. As Mr. Seery testified,

1 the number can go up based upon the value he can generate from  
2 the assets and, importantly, from litigation claims. Class 8  
3 creditors could end up receiving a hundred percent on  
4 account of their claims. Class 7 creditors are fixed at 85  
5 percent.

6 Giving Class 8 creditors the opportunity to roll the dice  
7 and potentially get more or less than the 85 percent offered  
8 to Class 7 is not at all unfair.

9 For these reasons, Your Honor, the Court has the ability  
10 and should confirm the plan pursuant to the cram-down  
11 provisions of 1129(b) .

12 Your Honor, I'm now going to switch from the statutory  
13 requirements to all the issues raised by the release,  
14 injunction, and exculpation provisions.

15 I'd just like to take a brief sip of water.

16 Dugaboy -- I will first deal with the Debtor release  
17 provided in Article 9(f) of the plan, which we claim is  
18 appropriate. Dugaboy and the U.S. Trustee have objected to  
19 the release contained in Article 9(f). Dugaboy objects  
20 because it believes that the Debtor release releases claims  
21 that the Claimant Trust or Litigation Trust have that have not  
22 yet arisen, and the U.S. Trustee objects because it believes  
23 that the release is a third-party release.

24 These objections have no merit, and they should be  
25 overruled.

1       I would like to ask Ms. Canty to put up a demonstrative  
2 which contains the provision Article 9(f) of the plan.

3       Your Honor, as set forth in this Article 9(f), only the  
4 Debtor is granting any release. While that --

5           THE COURT: And for the record, it's 9(d)? 9(d),  
6 right?

7           MR. POMERANTZ: 9(d)? 9(d), correct, Your Honor.

8           THE COURT: Yes. Okay.

9           MR. POMERANTZ: Sorry about that.

10          THE COURT: Uh-huh.

11          MR. POMERANTZ: While the release is broad, it does  
12 not purport to release the claims of any third party. The  
13 Claimant Trust and the Litigation Trust are only included in  
14 the release as successors of the Debtor. The release is  
15 specifically only for claims that the Debtor or the estate  
16 would have been legally entitled to assert in their own right.

17          Section 1123(b)(3)(A) of the Bankruptcy Code provides that  
18 a plan may provide for the settlement or adjustment of any  
19 claims or interests belonging to the debtor or the estate, and  
20 that's exactly what the Debtor release provides.

21          Accordingly, Dugaboy is wrong that the release effects a  
22 release of claims that the Claimant Trust or the Litigation  
23 Sub-Trust have that won't arise until after the effective  
24 date. And the U.S. Trustee is simply wrong; there's no third-  
25 party release aspect under the release.

1       The last point I will address on the release, Your Honor,  
2 is who is being released and why and what does the evidence  
3 show. The Debtor release extends to release parties which  
4 include the independent directors, Strand, for actions after  
5 January 9th, Jim Seery as the CEO and CRO, the Committee,  
6 members of the Committee, professionals, and employees.

7       You have heard Mr. Seery's testimony that the Debtor does  
8 not believe that any claims against the parties that are  
9 proposed to be released actually exist. You have heard Mr.  
10 Seery's testimony that he worked closely with the employees  
11 and believes that not only have they all been instrumental in  
12 getting the Debtor to the -- be on the cusp of plan  
13 confirmation, but that also Mr. Seery is not aware of any  
14 claims against them.

15       Moreover, as Mr. Seery testified, the release for the  
16 employees is only conditional. He testified that the  
17 employees are required to assist in the monetization of assets  
18 and the resolution of claims, and if they do not like -- if  
19 they do not lose their release, then any Debtor claims are  
20 tolled, such that could be pursued by the Litigation Trustee  
21 at a future time.

22       Lastly, I'm sure that the Dondero entities will argue that  
23 someone needs to investigate claims against Mr. Seery for  
24 mismanagement or for, God forbid, having failed to file the  
25 2015.3 statements. Such claims are part of the continuing

1 harassment of Mr. Seery that the Dondero entities have  
2 embarked on after it was apparent that nobody would support  
3 their plan.

4 There is no evidence of any claims that exist, Your Honor.  
5 In fact, the Committee and its professionals have watched the  
6 Debtor through this case like a hawk. They have not been  
7 afraid to challenge the Debtor's actions in general and Mr.  
8 Seery's in particular. FTI has worked on a daily basis with  
9 DSI and the company, had access to information. When COVID  
10 was happening, they were looking at trades going on on a daily  
11 basis.

12 So if the Committee, whose members hold approximately \$200  
13 million of claims against the estate, are okay with the  
14 release against the independent directors and Mr. Seery, that  
15 should provide the Court with comfort to approve the releases  
16 as part of the plan.

17 In summary, Your Honor, the Debtor release is entirely  
18 appropriate and does not affect the release of third-party  
19 claims that have not yet arisen.

20 Next, Your Honor, I want to go to the discharge. There's  
21 been objections to the discharge. Dugaboy and NexPoint have  
22 objected that the Debtor receiving a discharge under the plan  
23 -- argue a debtor is liquidating. The objection is not well  
24 taken based upon Mr. Seery's testimony regarding what it is  
25 the Claimant Trust and the Reorganized Debtor plan to do after

1 the effective date, as compared to what the limitations of a  
2 discharge are under 1141(d) (3).

3 Your Honor, Article 9 of the -- 9(b) of the plan provides  
4 that as -- except as otherwise expressly provided in the plan  
5 or the confirmation order, upon the effective date, the Debtor  
6 and its estate will be discharged or released under and to the  
7 fullest extent provided under 1141(d) (A) [sic] and other  
8 applicable provisions of the Bankruptcy Court. Bankruptcy  
9 Code.

10 Section 1141(d) (3) provides an exception to the discharge,  
11 and I'd like to have that section put up for Your Honor at  
12 this point. Ms. Canty?

13 As this -- as the section reflects, and as the Fifth  
14 Circuit has ruled in the *TH-New Orleans Limited Partnership*  
15 case cited in our materials, in order to deny the debtor a  
16 discharge under 1141(d) (3), three things must be true: (1)  
17 the plan provides for the liquidation of all or substantially  
18 all of the property in the estate; (2) the debtor does not  
19 engage in business after consummation of the plan; and (3) the  
20 debtor would be denied a discharge under 727(a) of this title  
21 if the case was converted to Chapter 7. Here, only C applies.

22 With respect to A, Your Honor, while the plan does project  
23 that it will take approximately two years to monetize the  
24 Debtor's assets for fair value, the Debtor is just not  
25 liquidating within the meaning of Section A.

1       As Mr. Seery testified, during the post-confirmation  
2 period, post-effective date period, the Debtor will continue  
3 to manage its funds and conduct the same type of business it  
4 conducted prior to the effective date. It'll manage the CLOs.  
5 It'll manage Multi-Strat. It'll manage Restoration Capital.  
6 It'll manage the Select Fund, and it'll manage the Korea Fund.

7       The Bankruptcy Court for the Southern District of New  
8 York's 2000 opinion in *Enron*, cited in our materials, is on  
9 point. There, the Court found that a debtor liquidating its  
10 assets over an indefinite period of time that is likely to  
11 take years is not liquidating within the meaning of Section  
12 1141(b)(3)(A), justifying a denial of discharge.

13       But even if we failed A, based upon Mr. Seery's testimony,  
14 we would not fail B. The Debtor will be continuing to do what  
15 it has done during the case, as it did before, as I said,  
16 managing its business. B says the debtor does not engage in  
17 the business after management. So while Mr. Seery testified  
18 that it would take approximately two years, it could take  
19 more, it could take less, and there is no requirement to  
20 liquidate assets over a period of time.

21       Accordingly, Your Honor, the Debtor is conducting the type  
22 of business contemplated by Section B so as not to just deny a  
23 discharge.

24       As the Fifth Circuit said in the *TH-New Orleans* case, the  
25 court granted a discharge there because it was likely that the

1 debtor would be liquidating its assets and conducting business  
2 (indecipherable) years following a confirmation date. And  
3 this result makes sense, Your Honor, because the Debtor will  
4 need the discharge and the tenant injunctions, which I'll get  
5 to in a moment, in order to prevent interference with the  
6 Debtor's ability to implement the terms of the plan and make  
7 distributions to creditors.

8 I would now like, Your Honor, to turn to the exculpation  
9 provisions, which there's been -- there's been a lot of  
10 briefing on it, and I know Your Honor is very aware of the  
11 exculpation provisions and the *Pacific Lumber* case. And  
12 several parties have objected to the exculpation contained in  
13 the plan, based primarily on the Fifth Circuit ruling in  
14 *Pacific Lumber*.

15 The exculpation provision, which is not dissimilar to what  
16 is found in many plans around the country, including in plans  
17 confirmed in bankruptcy courts in the Fifth Circuit, acts to  
18 exculpate the exculpated parties for negligent-only acts as it  
19 contains the standard carve-outs for gross negligence,  
20 intentional conduct, and willful misconduct.

21 I do want to bring to the Court's attention a deletion we  
22 made to the parties protected by the exculpation in the plan  
23 and now -- were filed on February 1st. The definition of  
24 exculpated parties included, before February 1, not only the  
25 Debtor but its direct and indirect majority-owned subsidiaries

1 and the managed funds. In the plan amendment, we have deleted  
2 the Debtor's direct and indirect majority-owned subsidiaries  
3 and managed funds from the definition and are not seeking  
4 exculpation for those entities.

5 But before, Your Honor, I address *Pacific Lumber* and why  
6 the Debtor believes it does not preclude the Court from  
7 approving the exculpation in this case, I do want to focus on  
8 something that the Objectors conveniently ignore from their  
9 argument.

10 As I mentioned in my opening argument, Your Honor, the  
11 independent directors were appointed pursuant to the Court's  
12 order on January 9, 2020. They have resolved many issues  
13 between the Debtor and the Committee, and avoided the  
14 appointment of a Chapter 11 trustee.

15 The January 9th order was specifically approved by Mr.  
16 Dondero, who was in control of the Debtor at the time, and I  
17 believe the transcripts that are admitted into evidence will  
18 demonstrate that he was fully behind the approval of the  
19 January 9th order.

20 In addition to appointing the independent directors into  
21 what was sure to be a contentiously litigious case, the  
22 January 9th order set the standard of care for the independent  
23 directors, and specifically exonerated them from negligence.

24 You have heard Mr. Seery and Mr. Dubel testify that they  
25 had input into what the order said and would have not agreed

1 to be appointed as independent directors if it did not include  
2 Paragraph 10, as well as the provisions regarding  
3 indemnification and D&O insurance.

4 I would like to put a demonstrative on the screen, which  
5 is actually Paragraph 10 of that order. Your Honor, Paragraph  
6 10, there's two concepts embedded here. First, it requires  
7 any parties wishing to sue the independent directors or their  
8 agents to first seek such approval from the Bankruptcy Court.  
9 Secondly, and importantly for purposes of the independent  
10 directors and their agents, who would include the employees,  
11 it set the standard of care for them during the Chapter 11 and  
12 entitled them to exculpation for negligence. Paragraph 10  
13 says the Court will only permit a suit to go forward if such  
14 claim represents a colorable claim for willful misconduct or  
15 gross negligence.

16 And Your Honor, Paragraph 10 does not expire by its terms.

17 By not including negligence in the definition of what a  
18 colorable claim might be, the Court has already exonerated the  
19 independent directors and their agents, which include the  
20 employees acting at their direction.

21 And because the independent directors and their agents are  
22 exonerated under Paragraph 10, Strand needs to be exonerated  
23 as well for actions occurring after January 9th. This is  
24 because a suit against Strand for conduct after the  
25 independent board was appointed is effectively a suit against

1 the independent directors, who were the only people in control  
2 of Strand at that time.

3 After the effective date, Mr. Dondero will regain control  
4 of Strand, as the independent directors will be discharged.  
5 And for parties able to sue Strand essentially for negligence  
6 for conduct conducted by the independent directors after  
7 January 9th, Strand will then be able to seek indemnification  
8 from the Debtor under the Debtor's partnership agreement  
9 because the partnership agreement does provide the general  
10 partner is entitled to indemnification.

11 Accordingly, an exculpation for Strand is really the  
12 functional equivalent of an exculpation for the independent  
13 directors and the Debtor.

14 The January 9th order was not appealed, and an objection  
15 to exculpation at this point as it relates to the independent  
16 directors, their agents, and Strand is a collateral attack on  
17 this order. So, Your Honor, Your Honor does not even need to  
18 get to the thorny issues addressed by *Pacific Lumber*.

19 However, even in the absence of the January 9th order,  
20 exculpation of the independent directors and their employees,  
21 as well as the other exculpated parties, is not prohibited by  
22 *Pacific Lumber*. In *Pacific Lumber*, the Fifth Circuit reversed  
23 a bankruptcy court order confirming a plan because the  
24 exculpation provision was too broad and included parties that  
25 the Fifth Circuit thought could not be exculpated under

1 Section 524(e) of the Code.

2 A close look at the issue before the Court, Your Honor,  
3 the reasoning for the Court's ruling and why certain parties  
4 like Committee and its members were entitled to exculpation,  
5 reflects that this case does not prevent the Court from  
6 approving exculpation of this case.

7 A careful read of the underlying briefs and opinions in  
8 *Pacific Lumber* reveals that the concern that the Appellants  
9 had in that case was the application of exculpation to non-  
10 fiduciary sponsors. There were two competing plans in the  
11 case. The first was filed by the indenture trustee. The  
12 second was filed by the debtor's parent and lender, and was  
13 deemed -- called the Marathon Plan. The Court confirmed the  
14 Marathon Plan, and the indenture trustee appealed, and the  
15 indenture trustee argued that the plan sponsors could not be  
16 exculpated.

17 After determining that the appeal of the exculpation  
18 provisions were not equitably moot, the Fifth Circuit  
19 determined that exculpation was not authorized under 524(e) of  
20 the Code because that section provides a discharge of the  
21 debtor does not affect the liability of any other entity on  
22 such debt.

23 However, and here's the important part, Your Honor: The  
24 Fifth Circuit did not say that all exculpations are prohibited  
25 under the Code and authorized the exculpation of the Committee

1 and its members. And why did the Court do that? Because it  
2 looked at the Committee's qualified immunity under 1103 and  
3 also reasoned that Committee members are essentially  
4 disinterested volunteers that should be entitled to  
5 exculpation on negligence.

6 The Court also cited approvingly *Colliers* for the  
7 proposition that if Committee members were not exonerated for  
8 negligence and subject to suit by people who are unhappy with  
9 them, they just would not serve.

10 Accordingly, the Fifth Circuit based its willingness to  
11 exonerate Committee members on the strong public policy that  
12 supports exonerating those parties under those  
13 circumstances. And against this backdrop, Your Honor, there  
14 are several reasons why the Court should authorize exonerating  
15 in this case, notwithstanding *Pacific Lumber*.

16 First, Your Honor, the independent directors in this case  
17 are analogous -- much more analogous to the Committee members  
18 than the Fifth Circuit ruled were entitled to than the  
19 incumbent officer and directors.

20 Your Honor has the following facts before the Court, based  
21 upon the testimony of Mr. Seery and Mr. Dubel and other  
22 evidence in the record. The independent board members were  
23 not part of the Highland enterprise before the Court appointed  
24 them on January 9th. The Court appointed the independent  
25 directors in lieu of a Chapter 11 trustee to address what the

1 Court perceived as the serious conflicts of interest and  
2 fiduciary duty concerns with current management, as identified  
3 by the Committee.

4 The independent directors would not have agreed to accept  
5 their role without indemnification, insurance, exculpation,  
6 and the gatekeeper function provided by the January 9th order.

7 And Mr. Dubel testified regarding the significant  
8 experience he has as an independent director during his 30-  
9 plus years in the restructuring community, including several  
10 engagements as an independent director in Chapter 11 cases.  
11 And he testified that independent directors have become  
12 commonplace in complex restructurings over the last several  
13 years and have been appointed in many cases, including high-  
14 profile cases. We've cited to just a few of those cases in  
15 our brief, but we could go on and on.

16 Mr. Dubel testified that the independent directors are a  
17 critical tool in proper corporate governance and restoring  
18 creditor confidence in management in modern-day  
19 restructurings, and he testified that, based upon his  
20 experience, independent directors expect to be indemnified by  
21 the company, expect to obtain directors and officers  
22 insurance, and expect to be exonerated from claims of  
23 negligence when they agree to be appointed.

24 He further testified that if independent directors cannot  
25 be assured that they will be exonerated for simple negligence,

1 he believes they will be unwilling to serve in contentious  
2 cases like the one we have here, which will have a material  
3 adverse effect on the Chapter 11 restructuring process as we  
4 know it.

5 Based upon the foregoing testimony, Your Honor, which is  
6 uncontroverted, the Court should have no problem finding that  
7 the independent directors are much more analogous to the  
8 Committee members in *Pacific Lumber* who the Fifth Circuit said  
9 could be exculpated.

10 The facts, these facts also distinguish this case from the  
11 *Dropbox v. Thru* case which Your Honor decided and which was  
12 reversed on this issue by the District Court. In neither  
13 *Pacific Lumber* or *Thru* was there an argument that the policy  
14 reasons that supported exculpation of Committee members also  
15 supported the exculpation of the parties sought to be  
16 exculpated.

17 Moreover, Your Honor, the independent directors in this  
18 case were pointed as essentially as substitute for a Chapter  
19 11 trustee. There was a Chapter 11 trustee motion filed a few  
20 days before, I believe, and the Court, in approving this, said  
21 that you -- better than a Chapter 11 trustee. And Chapter 11  
22 Trustees are entitled to qualified immunity. So, while, yes,  
23 the independent directors aren't truly Chapter 11 trustees,  
24 they are analogous.

25 Second, Your Honor, while there is language in *Pacific*

1       Lumber that says that the directors and officers of the debtor  
2 are not entitled to exculpation, the issue before the Court  
3 really on appeal was the plan sponsors and whether they were.  
4 So I would argue that any discussion of the exculpation not  
5 being available for directors and officers in the Fifth  
6 Circuit opinion in *Palco* is actually dicta.

7           Third, Your Honor, as I discussed before, the *Pacific*  
8 *Lumber* decision was based solely on 524(e) of the Bankruptcy  
9 Code, which only says that the discharge of a claim against  
10 the debtor does not affect the discharge of a third party.  
11 However, the Debtor is not relying on 524(e) as the basis of  
12 their exculpation. As we outline in our brief, Your Honor, we  
13 believe that the exculpation is appropriate under Section 105  
14 and 1123(b) (6) as a means -- part of an implementation of the  
15 plan.

16           Importantly, Your Honor, as other courts hostile to third-  
17 party releases have determined, exculpation only sets a  
18 standard of care for parties and is not an effort to relieve  
19 fiduciaries of liability.

20           Other courts that have aligned with the Fifth Circuit and  
21 rejected third-party releases, like the Ninth Circuit, have  
22 recently determined exculpation has nothing to do with 524(e).  
23 In *In re Blixseth*, a Ninth Circuit case decided at the end of  
24 2020 cited in our materials, they examined several of their  
25 circuit cases that had strongly prohibited non-consensual

1 third-party releases under 524(e). But again, the Court  
2 concluded that 524(e) only prohibits third parties from being  
3 released from liability of a prepetition claim for which the  
4 debtor receives a discharge. The Court reasoned that the  
5 exculpation clause, however, protects parties from negligence  
6 claims relating to matters that occurred during the Chapter 11  
7 case and has nothing to do with 524(e).

8       The Ninth Circuit, which along with the Fifth Circuit has  
9 been notorious for prohibiting third-party releases, issued  
10 its ruling against this backdrop and said that exculpations  
11 are appropriate.

12       Your Honor, the Objectors made a point yesterday of  
13 pointing out that Strand, as the Debtor's general partner, is  
14 liable for the debts under applicable law. To the extent they  
15 intend to argue that the exculpation is seeking to discharge  
16 any such prepetition liability, they would be wrong. The  
17 exculpation only applies to postpetition matters. And to the  
18 extent they argue that the exculpation seeks to discharge  
19 Strand's potential postpetition liability, for the reasons I  
20 discussed, a claim against Strand will essentially be a claim  
21 against the Debtor because the Debtor will be obligated to  
22 indemnify them.

23       Accordingly, Your Honor, we submit that if this matter  
24 goes up to appeal to the Fifth Circuit, which it may very well  
25 do, that the Fifth Circuit may very well come out the same way

1 as the Ninth Circuit and start relaxing the standard or  
2 otherwise provide that the independent directors are much more  
3 like Committee members.

4       Lastly, Your Honor, if the Court does confirm the plan,  
5 which we certainly hope it will do, it will have made a  
6 finding that the plan has been proposed in good faith, and in  
7 doing so, the Court essentially finds that the independent  
8 directors and their agents have acted appropriately and  
9 consistent with their fiduciary duties, and it makes --  
10 exculpation for negligence naturally flows from that finding.

11       Your Honor, I would now like to go to the injunction  
12 provisions, and my argument is that the injunction provisions  
13 as amended are appropriate.

14           THE COURT: Can I stop you?

15           MR. POMERANTZ: We received several of -- yes.

16           THE COURT: I want to just recap a couple of things I  
17 think I heard you say. You're not asking this Court, you say,  
18 to go contrary to *Pacific Lumber* per se. You have thrown out  
19 there the possibility that *Pacific Lumber* mistakenly relied on  
20 524(e) in rejecting exculpations of plan sponsors. You're  
21 saying, eh, as a technical matter, I think they were wrong in  
22 focusing on that statute because that statute seems to deal  
23 with prepetition liability. Okay? Its actual wording, 524(e)  
24 states, discharge of a debt of a debtor does not affect the  
25 liability of any other entity on such debts.

1       And reading between the lines, I think you're saying --  
2 well, maybe this isn't what you're saying, but here's what I  
3 inferred -- "debt" is defined in 101(12) to mean liability on  
4 a claim, and then "claim" is defined in 101(5) of the  
5 Bankruptcy Code as meaning right to payment. It doesn't say  
6 as of the petition date, but I think if you look at, then,  
7 Section 502 of the Bankruptcy Code that addresses claims and  
8 interests, clearly, it seems to be referring to the  
9 prepetition time period, you know, claims and interest as of  
10 the petition date. And then -- that's 502. And then 503  
11 speaks of, for the most part, postpetition administrative  
12 expenses.

13       So that was my rambling way of saying I'm understanding  
14 you to say, eh, as a technical matter, we think the Fifth  
15 Circuit was wrong to focus on 524(e) because when you're  
16 talking about exculpation you're talking about postpetition  
17 liability, not prepetition liability. And 524(e) is talking  
18 more about prepetition liability.

19       But I think what I also hear you saying is, at bottom,  
20 *Pacific Lumber* was sort of a policy-driven holding where, you  
21 know, we're worried about no one would ever sign up for being  
22 on an unsecured creditors' committee if they could be exposed  
23 to lawsuits. They're fiduciaries, we think, for policy  
24 reasons. Exculpation is appropriate for this one group. And  
25 you're saying, well, they didn't have an independent board

1 that they were considering. They were just considering non-  
2 fiduciary plan sponsors. And so the rationale presented by  
3 *Pacific Lumber* applies equally here, and just they didn't make  
4 a holding in this factual context.

5 Have I recapped what you're saying?

6 MR. POMERANTZ: Your Honor, that's generally --  
7 generally correct, with a couple of nuances. So, yes, first,  
8 I think, on a policy basis, Your Honor -- again, putting aside  
9 the January 9th order, because we don't see --

10 THE COURT: Right. Right.

11 MR. POMERANTZ: -- Your Honor even needs to get to  
12 this issue.

13 THE COURT: I understand.

14 MR. POMERANTZ: But if Your Honor does get to this  
15 issue, we think, as a first point, Your Honor could be totally  
16 consistent with *Pacific Lumber* because there's policy reasons  
17 and there was not a categorical rejection of exculpation.  
18 Okay. So if there was a categorical rejection, then it  
19 wouldn't have been okay for committee members. Okay.

20 Second argument, yes, we don't think -- we think it's part  
21 of dicta. It's not part of the holding. We understand that  
22 other courts may have not agreed, maybe your *Thru* case, which  
23 Your Honor was appealed on.

24 But the third issue, our argument is all they looked at  
25 was 524(e). They said 523 -- 4(e) does not authorize it.

1 They did not say 524(e) prohibits it.

2 We think there's other provisions in the Code. And then  
3 when you basically add in the analysis that Your Honor  
4 provided, which we agree with, and what 524 was -- to do,  
5 524(e) just says that discharge doesn't affect. It doesn't  
6 say that under another provision of the Code or for another  
7 reason you are authorized to give an exculpation. I think  
8 it's a nuance and it's a difference there.

9 And my point of bringing up the *Blixseth* case -- which, of  
10 course, is Ninth Circuit and it's not binding on Your Honor,  
11 it's not binding on the Fifth Circuit -- is to say, when that  
12 was presented to them, they saw the distinction that 524(e)  
13 has nothing to do with an exculpation. And while, yes, the  
14 Fifth Circuit hasn't ruled on that, and if the Fifth -- if  
15 that argument is made to the Fifth Circuit, we don't know how  
16 they would rule, I think that, based upon their analysis --  
17 which, again, Your Honor, is no more than a page and a half of  
18 their opinion, right, of a long, lengthy opinion on the  
19 confirmation issues. So I think, Your Honor, with the Fifth  
20 Circuit, there is a good chance that based upon the developing  
21 case law of exculpation, based upon the sister circuit in  
22 *Blixseth* making that distinction, that there is a very good  
23 chance that the Fifth Circuit would change.

24 But look, I recognize that argument requires Your Honor to  
25 say, okay, this is outside and -- and what *Pacific Lumber* did

1 or didn't do. But I think, Your Honor, there's several  
2 potential reasons, there's several potential arguments that  
3 you can get to the same place.

4 THE COURT: Okay. Thank you.

5 MR. POMERANTZ: Okay. If I may just get another  
6 glass of -- sip of water before my time starts?

7 THE COURT: Okay.

8 MR. POMERANTZ: Okay, Your Honor. We're now turning  
9 to the injunction provision. The Debtor received several  
10 objections to the injunction provisions in -- I think I have  
11 it right now -- Article 9(f) to the plan. And we've modified  
12 Article 9(f) to address certain of those concerns, and we  
13 believe that, as modified, that the injunction provision  
14 implements and enforces the plan's discharge, release, and  
15 exculpation provisions to prevent parties from pursuing claims  
16 in interest that are addressed by the plan and otherwise  
17 interfering with consummation and implementation of the plan.

18 I'd like to put up the first paragraph of the injunction  
19 on the screen now.

20 Okay, Your Honor. The first paragraph, all it does is  
21 prohibits the enjoined parties from taking action to interfere  
22 with consummation or implementation of the plan. I suspect a  
23 sentence like that is probably in hundreds of plans in the  
24 Fifth Circuit and elsewhere.

25 Initially, to address a concern that it applied to too

1 many parties, the Debtor added a definition in the revised  
2 plan that defines "enjoined parties," which I'd like to now  
3 put that definition up on the screen.

4       The changes -- it's a little hard to read there, but you  
5 have it in the -- oh, there you go. The changes made clear  
6 that only parties who have a relationship to this case, either  
7 holding a claim or interest, having appeared in the case, be a  
8 -- or be a party in interest, Jim Dondero, or related entity,  
9 or related person of the foregoing are covered. The claim  
10 objectors argue that the word "implementation and  
11 consummation" is vague, or vague and unclear. Your Honor,  
12 these terms are both defined in the Bankruptcy Code and under  
13 the case law, and they're, as I said, common features of many  
14 plans.

15       Section 1123(a)(5) of the Code provides that a plan shall  
16 provide for its implementation, and identifies a list of items  
17 that the plan can include. Article 4 of our plan is defined  
18 as "Means of Implementation of This Plan," and describes the  
19 various corporate steps required to implement the provisions  
20 of the plan, including canceling equity interests, creation of  
21 new general partners and a limited part of the Reorganized  
22 Debtor, the restatement of the limited partnership agreement,  
23 and the establishment of the various trusts.

24       Paragraph 1 rightly and appropriately enjoins efforts to  
25 interfere with these steps.

1       Nor is the term "consummation of the plan" vague.  
2 "Consummation" also is a commonly-used term and has been  
3 defined by the Fifth Circuit and the Code. 1102 -- 1101(2)  
4 defines "Substantial Consummation" to be the transfer of  
5 assets to be transferred under the plan, the assumption by the  
6 debtor of the management of all the property dealt with by the  
7 plan, and the commencement of distributions under the plan.

8       Section 1142 gives the Court authority to direct a party  
9 to perform any act necessary for consummation of a plan. And  
10 as the Fifth Circuit, in *United States Brass Corp.*, which is  
11 said in our material, states, said the Bankruptcy Court had  
12 post-confirmation jurisdiction to enforce the unperformed  
13 terms of a plan with respect to a matter that could affect the  
14 parties' post-confirmation rights because the plan had not  
15 been fully consummated.

16       And Your Honor just wrote on this issue last year in the  
17 *Senior* -- the *Texas* -- the *TXMS Real Estate v. Senior Care*  
18 case, and you cited to *U.S. Brass* to find that, in that case,  
19 post-confirmation jurisdiction existed to resolve a dispute  
20 relating to an assumed contract because the matter related to  
21 interpretation, implementation, and execution of the plan.

22       Accordingly, Your Honor, neither implementation or  
23 consummation are vague, and the first paragraph of the  
24 injunction is necessary and appropriate to enforce the  
25 Debtor's discharge.

1       As I said before, I will leave it to Mr. Kharasch to  
2 address specifically the concerns that the Advisor and the  
3 Funds have with the injunction.

4       The second and third paragraphs of the injunction, Your  
5 Honor, certain parties have objected to them on the ground  
6 that they constitute an improper release of the independent  
7 directors as well as the release of claims against the  
8 Reorganized Debtor, the Claimant Trust, and the Litigation  
9 Sub-Trust, entities that will not have come into existence  
10 until after the effective date.

11       We believe we have addressed these concerns by  
12 modifications to the second and third paragraphs of the  
13 injunction, which I would now like to put the second and third  
14 paragraphs on the screen.

15       (Pause.)

16       MR. POMERANTZ: As that is happening, Your Honor, I  
17 will -- there we go.

18       We believe that the changes that were made to these  
19 paragraphs should address the Objectors' concerns.

20       First, as with the first paragraph, we have created a  
21 defined term of "Enjoined Parties" who are subject to the  
22 injunction which is narrower than all persons, I believe, or  
23 all entities that was included in the prior plan. So we've  
24 narrowed that.

25       "Enjoined Parties" are generally defined, as I mentioned

1 before, as entities involved in this case or related to Jim  
2 Dondero, or have appeared in this case.

3 Second, we have removed independent directors from these  
4 paragraphs to address the concern that the injunction was a  
5 disguised third-party release.

6 Third, we have removed the Reorganized Debtor and the  
7 Claimant Trust from the second paragraph and moved them to the  
8 third paragraph. We did this to make clear that the  
9 Reorganized Debtor and Claimant Trust were only getting the  
10 benefit of the injunction as the successors to the Debtor. As  
11 the Reorganized Debtor and the Claimant Trust receives the  
12 property from the Debtor free and clear of all claims and  
13 interests and equity holders under 1141(c), they are entitled  
14 to the benefit of the injunction.

15 Fourth, we have addressed the concern that the injunction  
16 improperly affected set-off rights. We added language to make  
17 clear that the injunction would only affect the parties' set-  
18 off of an obligation owed to the Debtor to the extent that  
19 that was permissible under 553 and 1141 of the Bankruptcy  
20 Code.

21 In other words, we are punting the issue for another day,  
22 and there's nothing in the plan that gives the Debtor any more  
23 set-off rights than it otherwise has under the Bankruptcy  
24 Code.

25 Lastly, Your Honor, certain Objectors have argued that the

1 injunction somehow prevents them from enforcing the rights  
2 they have under the plan or the confirmation order. We don't  
3 really understand this concern, as the language leading into  
4 the second paragraph of the injunction says, except as  
5 expressly provided in the plan, the confirmation order, or a  
6 separate order of the Bankruptcy Court.

7 With these modifications, Your Honor, the provisions do  
8 nothing more than implement 1123(b)(6) and 1141 by preventing  
9 parties from taking actions to interfere with the Debtor's  
10 plan.

11 The Court has also heard testimony from Mr. Seery  
12 regarding the importance of the injunction to implementation  
13 of the plan. He testified that he intends to monetize assets  
14 in a way that will maximize value. And to effectively do  
15 that, he has testified that the Claimant Trust needs to be  
16 able to pursue its objectives without interference and  
17 continued harassment from Mr. Dondero and his related  
18 entities.

19 In fact, Mr. Seery testified that if the Claimant Trust  
20 were subject to interference by Mr. Dondero, it would take him  
21 more time to monetize assets, they would be monetized for less  
22 money, and creditors would be harmed.

23 If Your Honor doesn't have any questions for me on the  
24 injunction provisions, I'd like to turn to the last part of  
25 the injunction, which is really the gatekeeper provision.

1 THE COURT: All right. You may.

2 MR. POMERANTZ: Your Honor, the last paragraph in  
3 Article 9(f) is really not an injunction but is rather a  
4 gatekeeper provision. And as originally drafted, it'd do two  
5 things: first, it'd require that before any entity, which is  
6 defined very broadly, could file an action against a protected  
7 party relating to certain specified matters, the entity would  
8 have to seek a determination from this Court that the claim  
9 represented are colorable claim of bad faith, criminal  
10 conduct, willful misconduct, fraud, or gross negligence. The  
11 specified matters to which the gatekeeper provision would  
12 apply included the Chapter 11 case, negotiations regarding the  
13 plan, the administration of the plan, the property to be  
14 distributed under the plan, the wind-down of the Debtor's  
15 business, the administration of the Claimant Trust, or  
16 transactions related to the foregoing.

17 Subject to certain exceptions for Dondero-related parties,  
18 protected parties were defined to include the Debtor, its  
19 successors and assigns, indirect and direct, majority-owned  
20 subsidiaries and managed funds, employees, Strand, Reorganized  
21 Debtor, the independent directors, the Committee and its  
22 members, the Claimant Trust, the Claimant Trustee, the  
23 Litigation Trust, the Litigation Sub-Trustee, the members of  
24 the Oversight Committee, retained professionals, the CEO and  
25 CRO, and persons related to the foregoing. Essentially,

1 parties related to the pre-effective-date administration of  
2 the estate or the post-confirmation implementation of the  
3 plan.

4 Second, the gatekeeper provision as originally presented  
5 gave the Bankruptcy Court exclusive jurisdiction to adjudicate  
6 any cause of action that it determined would pass through the  
7 gate. The gatekeeper provision, Your Honor, is not a release  
8 in any way. Rather, it permits enjoined parties who believe  
9 they have a claim against the protected parties to pursue such  
10 a claim, provided they first make a showing that the claim is  
11 colorable to the Bankruptcy Court.

12 Several parties, Your Honor, objected to the Bankruptcy  
13 Court having exclusive jurisdiction to adjudicate the claims  
14 that pass through the gate. The Debtor believes that the  
15 Bankruptcy Court would ultimately have jurisdiction of any of  
16 those claims that pass through the gate. However, the Debtor  
17 did, upon reflection, appreciate the concern that if the Court  
18 agreed to that now, it would essentially be determining its  
19 jurisdiction before a claim was filed.

20 Accordingly, in the January 22nd plan, Your Honor, we  
21 amended the provision to provide that the Bankruptcy Court  
22 will only have jurisdiction over such claims to the extent it  
23 was legally permissible to do so, essentially deferring the  
24 issue to a later time.

25 And as Your Honor, I believe, in one of cases called the

1       *Icing on the Cake*, the retention and jurisdiction provisions  
2       in the plan only are to the extent under applicable law and  
3       are quite broad and include the things that we would have the  
4       Court -- have jurisdiction for the Court, otherwise  
5       determined.

6              The Court made some other changes to the gatekeeper  
7       provision, and I would like to place the amended gatekeeper  
8       provision on the screen right now. In addition to the change  
9       I mentioned, the Debtor made the following changes: the  
10      provision is limited now to apply only to enjoined parties,  
11      rather than any entity. Than any entity. Much narrower. The  
12      provision added the administration of the Litigation Sub-Trust  
13      to the matters to which the provision would apply. The  
14      provision makes clear now that any claim, including  
15      negligence, is a claim that could be sought and pursued  
16      through the gatekeeper function. And the provision made some  
17      other syntax changes.

18              We believe, Your Honor, with these changes, we believe  
19       that the gatekeeper provision is within the Court's  
20       jurisdiction and it's appropriate to include under the plan.

21              But certain parties have argued that the Court does not  
22       have the authority, the jurisdictional authority to perform  
23       the gatekeeper function, separate and apart from whether it  
24       has jurisdiction to adjudicate the claims that pass through  
25       the gate.

1        Your Honor, we submit that these arguments represent a  
2 fundamental misunderstanding of Bankruptcy Court jurisdiction  
3 and the Court's authority to make sure the Debtor is free of  
4 interference in carrying out the plan which I'll get to in a  
5 couple moments.

6        As a preliminary matter, Your Honor, it is important for  
7 the Court to remember that Paragraph 10 of the January 9 order  
8 already contains a gatekeeper provision as it relates to the  
9 independent directors and their agents. And as I mentioned on  
10 a couple of occasions, that order is not going away, it  
11 doesn't expire by its terms, and it cannot be collaterally  
12 attacked in this forum.

13        The Debtor does acknowledge, though, that the gatekeeper  
14 provision in the plan is broader in terms of the people it  
15 protects and it applies to post-confirmation matters.

16        Before I address the Court's authority to approve the  
17 gatekeeper provision, I want to summarize the evidence that it  
18 has heard from Mr. Seery and Mr. Tauber regarding why the  
19 gatekeeper is so important a provision to the success of the  
20 plan.

21        Although the Court is all too familiar with the history of  
22 litigation initiated by and filed against Mr. Dondero and his  
23 related affiliates, Mr. Seery spent some time on the stand  
24 testifying about the litigation so the Court would have a  
25 complete record for this hearing. He testified that prior to

1 the petition date, the Debtor faced years of litigation from  
2 Mr. Terry and Acis that led to the Acis bankruptcy case, which  
3 Your Honor has said many times it's still in your mind. Years  
4 of litigation with the Redeemer Committee which precipitated  
5 the filing of a bankruptcy case and resulted in an award very  
6 critical of the Debtor's conduct. Years of litigation with  
7 UBS. Years of litigation with Patrick Daugherty. And we  
8 placed all the dockets for all these matters before the Court.

9       Also, during the bankruptcy and after the Committee  
10 essentially rejected the Debtor's pot plan proposal and  
11 indicated -- and the Debtor indicated it would be terminating  
12 the shared service agreements with Mr. Dondero and his related  
13 entities, the Debtor was the subject of harassment from Mr.  
14 Dondero and related entities which resulted in the temporary  
15 restraining order against him, a preliminary injunction  
16 against him, a contempt motion, which Your Honor is scheduled  
17 to hear Friday, a motion by the Debtor's controlled -- by the  
18 Dondero-controlled investors and funds in CLO managed --  
19 managed by the Debtor, which the Court referred to that motion  
20 as being frivolous and a waste of the Court's time. Multiple  
21 plan objections, most of which are focused on allowing the  
22 Debtors to continue their litigation crusade against the  
23 Debtor and its successors post-confirmation. An objection to  
24 the Debtor approval of the Acis order and a subsequent appeal.  
25 An objection to the HarbourVest settlement and subsequent

1 appeal. A complaint and injunction against the Advisors and  
2 the Funds to prevent them from violating Paragraph 9 of the  
3 January 9th order. And a temporary restraining order against  
4 those parties, which was by consent.

5 Mr. Dondero's counsel tends to argue that he is the victim  
6 here and that the litigation is being commenced against him  
7 and -- instead of by him. That response does not even deserve  
8 a response, Your Honor. It is disingenuous.

9 Mr. Tauber testified that he was part of the team at Aon  
10 that sourced coverage for the independent directors after  
11 their appointment in January 2020 and that he has over 20  
12 years of underwriting experience. He testified that at Aon he  
13 builds bespoke insurance programs which are not cookie-cutter  
14 programs for his clients, with an emphasis on D&O and E&O.  
15 And he was asked by the independent board to obtain D&O and  
16 E&O insurance after the board's appointment on January 9th.

17 Based upon the process Aon conducted in reaching out to  
18 insurance carriers, Mr. Tauber testified that Aon was only  
19 able to obtain D&O insurance based upon the inclusion of  
20 Paragraph 10 of the January 9 order, the gatekeeper provision.  
21 I know Mr. Taylor said that that was spoon-fed to the  
22 insurers, but Mr. Tauber's testimony is they knew about Mr.  
23 Dondero and they knew about his litigation tactics, so it is  
24 not a good inference to be made from the testimony that they  
25 would not have required something. They probably would have

1 just said no.

2 Aon has now been -- Mr. Tauber testified that Aon has now  
3 been asked to obtain D&O coverage for the Claimant Trustee,  
4 the Litigation Trustee, the Oversight Committee, the members,  
5 the Claimant Trust, and the Litigation Sub-Trust. He  
6 testified that he and Aon have approached the insurance  
7 carriers that they believe might be interested in underwriting  
8 coverage.

9 And no, he hasn't approached every D&O and E&O carrier out  
10 there, and there may be, just like an investment banker  
11 doesn't have to approach everyone. They are experts in the  
12 field, and he testified they approached the people they  
13 thought would likely be willing or interested and potentially  
14 be willing to extend coverage. And as a result of Aon's  
15 efforts, Mr. Tauber has determined that there's a continued  
16 resistance to provide any coverage that does not contain an  
17 exclusion for actions relating to Mr. Dondero or his related  
18 entities. And he further believes that all carriers that will  
19 -- that have discussed a willingness to provide coverage will  
20 only do so if there is a gatekeeper provision, and only one  
21 carrier will agree to provide coverage without a Dondero  
22 exclusion.

23 Mr. Tauber testified that he believes that any ultimate  
24 policy will provide that if at any time the gatekeeper  
25 provision is not in place, either the carrier will not cover

1 any actions related to Mr. Dondero or his affiliates or that  
2 the coverage will be vacated or voided.

3 Based upon the foregoing record, Your Honor, which is  
4 uncontroverted, there's ample justification on a factual basis  
5 for approval of the gatekeeper provision.

6 I will now turn to the Court's authority to approve the  
7 gatekeeper provision.

8 There are three alternative bases upon which the Court can  
9 approve the gatekeeper provision. First, several provisions  
10 of the Bankruptcy Code give broad authority to approve a  
11 provision like the gatekeeper provision.

12 Second, the Court can analogize to the Barton Doctrine the  
13 facts and circumstances in this case and authorize the Court  
14 to act as a gatekeeper to prevent frivolous litigation from  
15 being filed against court-appointed officers and directors and  
16 those that will lead the post-confirmation monetization of the  
17 estate's assets.

18 And third, Your Honor, the Court can find that Mr. Dondero  
19 and his entities are vexatious litigants, and use the  
20 gatekeeper provision as a sanction to prevent the filing of  
21 baseless litigation designed merely to harass those in charge  
22 of the estate post-confirmation.

23 So, Bankruptcy Court authority. Your Honor, there are  
24 several provisions in the Bankruptcy Code which we rely on to  
25 support the Court's authority. First, Section 1123(a) (5)

1 permits the plan to approve adequate means of implementation,  
2 and contains a long, non-exclusive list. Mr. Seery's  
3 testimony is uncontroverted that a gatekeeper provision is  
4 necessary for the adequate implementation of the plan.

5 Second, Your Honor, 1123(b) (6) authorizes a plan to  
6 include any appropriate provision in a plan not inconsistent  
7 with any other provision in this Code. There are not any  
8 provisions and none have been cited by the Objectors that  
9 would prohibit a gatekeeper provision. Section 1141  
10 effectively holds that the terms of a plan bind the debtor and  
11 its creditors and vest property in a reorganized debtor, free  
12 and clear of the interests of third parties.

13 If nothing else, Your Honor, the spirit of 1141 allows the  
14 Court to prevent, in appropriate cases, vexatious litigation  
15 by unhappy creditors and parties in interest from torpedoing  
16 the plan.

17 1142(b), Your Honor, provides that the confirmation --  
18 that, after confirmation, the Court may direct any parties to  
19 perform any act necessary for the consummation of the plan,  
20 and requiring the party to seek court-approval before filing  
21 an action is certainly an act.

22 And lastly, Your Honor, Section 105 allows the Court to  
23 enter orders necessary to order other things, enforce orders  
24 of the Court like the confirmation order, and prevent an abuse  
25 of process which would certainly occur if baseless litigation

1       were filed against the parties in charge of the Reorganized  
2       Debtor and the trust vehicles entrusted with carrying out the  
3       plan.

4           Your Honor, gatekeepers are not a novel concept and have  
5       been approved by courts in appropriate circumstances. In the  
6       *Madoff* cases, the Court has been the gatekeeper post-  
7       confirmation to determine whether investor claims are  
8       derivative or direct claims.

9           In *General Motors*, the Court has been the gatekeeper post-  
10       confirmation to determine whether product liability claims are  
11       proper claims against the reorganized debtor.

12          Closer to home, Judge Lynn, Mr. Dondero's counsel,  
13       approved a gatekeeper provision, arguably even more far-  
14       reaching than the provision here, in the *Pilgrim's Pride* case.  
15       In that case, Judge Lynn held that *Pacific Lumber* prevented  
16       him -- prevented the Court from approving the exculpation  
17       provision in the plan. However, he did hold that it was  
18       appropriate for the Court to ensure that debtor  
19       representatives are not improperly pursued for their good-  
20       faith actions by requiring that any actions against the debtor  
21       or its representatives, and further, on the performance of  
22       their obligations as debtor-in-possession, be heard  
23       exclusively before the Bankruptcy Court.

24          And *Pilgrim's Pride* is not the only case in this district  
25       to include a gatekeeper provision, as Judge Houser approved

1 one in the *CHC Group* in 2016, which is cited in our materials.

2       The theme in all these cases, Your Honor, is that there  
3 are circumstances where it is necessary and appropriate for  
4 the Bankruptcy Court to act as a gatekeeper as a means of  
5 reducing litigation that could interfere with a confirmed plan  
6 and that a Court has the authority to approve such provisions.

7       The Objectors argue that the Bankruptcy Court does not  
8 have jurisdiction to approve that provision. The Debtor  
9 understands the argument as it related to the prior provision,  
10 which gave the Court exclusive jurisdiction over any claim it  
11 found colorable, and we've amended the plan to address that  
12 issue. The jurisdiction to deal with those claims could be  
13 left to a later day.

14       But to the extent the Objectors still pursue the  
15 jurisdiction argument in light of the current provision,  
16 they're really conflating two very different things: the  
17 ability to determine whether a claim is colorable and the  
18 ability to adjudicate that claim if the Court determines it's  
19 colorable.

20       None of the authorities cited by the Objectors hold that  
21 the Court is without jurisdiction to approve a gatekeeper  
22 provision like the one here. So, rather, what they do is they  
23 try to -- they argue, based upon the *Craig's Stores* case,  
24 which is narrower than other circuits of post-confirmation  
25 jurisdiction in the Bankruptcy Court, and argue that the

1 gatekeeper provision doesn't fall within that. But that --  
2 such reliance is misplaced, Your Honor.

3         *Craig* held that the Bankruptcy Court did not have  
4 jurisdiction to adjudicate a post-confirmation dispute over a  
5 private-label credit card agreement between the debtor and the  
6 bank. In declining to find jurisdiction, the Fifth Circuit  
7 remarked that there was no antagonism or claim pending between  
8 the parties as of the reorganization and no facts or law  
9 deriving from the reorganization or the plan was necessary to  
10 the claim asserted by the debtor.

11         However, in so ruling, Your Honor, the Fifth Circuit did  
12 reason that post-confirmation jurisdiction in the Bankruptcy  
13 Court continues to exist for matters pertaining to  
14 implementation and execution of the plan. Requiring parties  
15 to seek Bankruptcy Court determination the claim is colorable  
16 before embarking on litigation that will impact  
17 indemnification rights and affect distributions to creditors  
18 is not an expansion of jurisdiction and fits well within the  
19 *Craig* reasoning.

20         Unlike the credit card agreement dispute in *Craig*, Mr.  
21 Dondero and his entities have demonstrated tremendous  
22 antagonism towards the Debtor. And while the Debtor's plan  
23 may be confirmed, further litigation has been threatened by  
24 Mr. Dondero. It's in the pleadings. That's one of the  
25 reasons Mr. Dondero says his plan is better. It'll avoid

1 tremendous amount of litigation.

2 After *Craig*, the Fifth Circuit again examined the  
3 bankruptcy court's post-confirmation jurisdiction in the  
4 *Stoneridge* case in 2005. In that case, the Fifth Circuit  
5 ruled that a bankruptcy court has post-confirmation  
6 jurisdiction to resolve a dispute between two nondebtors that  
7 could trigger indemnification claims against a liquidating  
8 trust formed as a result of a confirmed plan.

9 And lastly, as I mentioned Your Honor's decision before,  
10 the *TXMS Real Estate* case, I think just a couple of months  
11 ago, it stands for the proposition that post-confirmation  
12 jurisdiction exists for matters bearing on the implementation,  
13 interpretation, and execution of a plan. In that case, Your  
14 Honor ruled that Your Honor had jurisdiction to resolve a  
15 post-confirmation dispute between a liquidating trust formed  
16 under a plan and a landlord, the result of which could  
17 significantly and adversely affect the value of the  
18 liquidating trust and monies available for unsecured  
19 creditors.

20 And you have heard Mr. Seery testify that litigation will  
21 have an adverse effect on the ability to make distributions to  
22 creditors.

23 So, Your Honor, under these authorities, the Court  
24 undoubtedly would have jurisdiction to act as the gatekeeper  
25 for the litigation.

1           There's also an independent basis for the gatekeeper  
2 provision, Your Honor, the Barton Doctrine, which the Court is  
3 very familiar from your opinion in the *In re Ondova* case in  
4 2017 and which provides that before a suit may be brought  
5 against a trustee, leave of Court is required. In *Ondova*, the  
6 Court reviewed the history of the doctrine in connection with  
7 litigation brought by a highly-litigious debtor against a  
8 trustee and his professionals. This Court noted that there  
9 are several important policies followed by the doctrine,  
10 including a concern for the overall integrity of the  
11 bankruptcy process and the threat of trustees being distracted  
12 from or intimidated from doing their jobs. And Your Honor's  
13 language still: For example, losers in the bankruptcy process  
14 might turn to other courts to try to become winners there by  
15 alleging the trustee did a negligent job.

16           Your Honor, this is precisely what the Debtor is trying to  
17 prevent here, Mr. Dondero and his entities from putting the  
18 bad experience before Your Honor in this case behind it and  
19 going to try to find better luck in a more hospitable court.

20           Your Honor, the Barton Doctrine originally only applied to  
21 receivers, and over the course of time has been extended to  
22 apply to various court-appointed fiduciaries, as we have cited  
23 in our materials: trustees, debtors-in-possession, officers  
24 and directors, employees, and attorneys representing the  
25 debtor.

1       And I expect the Objectors to argue that there is a  
2 statutory exception to the Barton Doctrine under 28 U.S.C. 959  
3 and it does not apply to acts or transactions in carrying out  
4 business conducted with a property. The exception, Your  
5 Honor, is very narrow and was meant to apply for things like  
6 slip-and-fall cases. In fact, the Eleventh Circuit in the  
7 *Carter v. Rodgers* case, 220 F.3d 1249 in 2000, held that  
8 Section 11 -- 28 U.S.C. 959(a) does not apply to suits against  
9 trustees for administering or liquidating the bankruptcy  
10 estate.

11       The Objectors also argue that the gatekeeper provision  
12 violates *Stern v. Marshal*. However, as the Court acknowledged  
13 in *Ondova*, the Fifth Circuit in *Villegas v. Schmidt* has  
14 recognized that the Barton Doctrine remains viable post-*Stern*  
15 *v. Marshal*. The Fifth Circuit reasoned that while Barton  
16 Doctrine is jurisdictional in that a court does not have  
17 jurisdiction of an action if preapproval has not been  
18 obtained, it does not implicate the extent of a bankruptcy  
19 court's jurisdiction to adjudicate the underlying claim,  
20 precisely the distinction we're making here. The bankruptcy  
21 court would be the gatekeeper for deciding whether the claim  
22 passes through the gate, and then after will decide if it has  
23 jurisdiction to rule on the underlying claim.

24       And this is important especially in a case like this, Your  
25 Honor, where Your Honor has had extensive experience with the

1 parties and is in the best position to determine whether the  
2 claims are valid or attempted to be used as harassment.

3 The Objectors will complain about the open-ended nature of  
4 the gatekeeper provision, whether it will or won't apply after  
5 the case is closed or a final decree is issued, and the unfair  
6 burden of their rights.

7 Your Honor has a previous reported opinion where basically  
8 jurisdiction does extend after a case is closed or a final  
9 decree is entered, so that issue is a red herring.

10 As Your Honor is well aware, it's a decade-long -- a  
11 decade of litigation against the Dondero-controlled entities  
12 that caused the Highland bankruptcy. And the Court is very  
13 well aware of the litigation that occurred in *Acis*, very well  
14 aware of the litigation that's occurred here that I mentioned  
15 a few minutes ago. Your Honor, it is not over, you'll be  
16 presiding over the contempt hearing.

17 And if the Court needs yet another ground to approve the  
18 gatekeeper provision, the Debtor submits that the procedure is  
19 an appropriate sanction for Dondero's vexatious litigation  
20 activities. We cited the *In re Carroll* case in the Fifth  
21 Circuit of 2017 that held that a bankruptcy court has the  
22 authority to enjoin a litigant from filing any pleading in any  
23 action without the prior authority from the bankruptcy court.

24 And in affirming the decision of the bankruptcy court, the  
25 Fifth Circuit commented on the reasons the bankruptcy court

1 gave for its ruling. After recounting the bad faith of  
2 appellants, the bankruptcy court determined that the Carrolls'  
3 true motives were to harass the trustee and thereby delay the  
4 proper administration of the estate, in the hope that they  
5 would be able to retain their assets or make pursuit of the  
6 assets so unappealing that the trustee would be compelled to  
7 settle on terms favorable to appellants.

8 Sounds familiar, Your Honor. The same can certainly be  
9 said about what Mr. Dondero is doing in this case.

10 And to make a showing that a party is vexatious litigant,  
11 the Court must find that the party has a history of vexatious  
12 and harassing litigation, whether the party has a good faith  
13 -- the litigation or has filed it as a means to harass, the  
14 burden to the Court and other parties, and the adequacy of  
15 alternative sanctions.

16 And as Your Honor is well aware from all the litigation,  
17 Your Honor is well, well able to make the finding required for  
18 the vexatious litigation finding.

19 But here, we don't ask for the drastic sanction of  
20 enjoining from any further filings. Rather, we just ask for a  
21 less-severe sanction, requiring Mr. Dondero and his entities  
22 to first make a showing that he has a colorable claim.

23 The Fifth Circuit in *Baum v. Blue Moon*, 2007, did exactly  
24 that. In *Baum*, the district court barred a vexatious litigant  
25 from initiating litigation without first obtaining the

1 approval of the district court. Ultimately, the matter  
2 reached the Fifth Circuit after the district court had  
3 modified the pre-filing injunction to limit it to a certain  
4 case, and then broadened it again based upon continued bad  
5 faith conduct.

6 On appeal, the Fifth Circuit, citing several prior cases,  
7 noted that a district court has the authority to impose a pre-  
8 filing injunction to defer vexatious, abusive, and harassing  
9 litigation.

10 And for those reasons, Your Honor, the Debtor asks the  
11 Court to overrule any objections to the gatekeeper provision.

12 Your Honor, I was just going to then go to the plan  
13 modification provisions, but I wanted to stop and see if you  
14 had any questions at this point.

15 THE COURT: I do not. Let's give him a time  
16 estimate, Nate. About how --

17 THE CLERK: Twenty.

18 MR. POMERANTZ: I have another five or six minutes, I  
19 think, based upon --

20 THE COURT: Okay.

21 MR. POMERANTZ: And then I'll be ready to turn it  
22 over to --

23 THE COURT: Okay.

24 MR. POMERANTZ: -- to Mr. Kharasch.

25 THE COURT: All right. Yes. You've got -- you've

1 done an hour and 33 minutes. So you have about, I guess, 37  
2 minutes left. Okay. Go ahead.

3 MR. POMERANTZ: Thank you, Your Honor.

4 I would like to address the modifications of the plan that  
5 were contained in our January 22nd plan and the additional  
6 changes filed on February 1, several of which I have referred.

7 As a preliminary matter, Your Honor, under 1127(b), the  
8 Debtor can modify a plan at any time prior to confirmation if  
9 -- and not require resolicitation if there's no adverse change  
10 in the treatment of claim or interest of any equity holder.

11 With that background, I won't go through the changes we  
12 made that I've already discussed, but I will point out a  
13 couple, Your Honor, that I would like to point out now. We  
14 have modified the plan with respect to conditions of the  
15 effective date in Article 8. First, a condition to the  
16 effective date will now be entry of a final order confirming a  
17 plan, as opposed just to entry of order. And final order is  
18 defined as the exhaustion of all appeals.

19 In addition, the ability to obtain directors and officers  
20 insurance coverage on terms acceptable to the Debtor, the  
21 Committee, the Claimant Trustee, the Claimant Trustee  
22 Oversight Board, and the Litigation Trustee is now a condition  
23 to the effective date.

24 The Court heard testimony today and has experienced  
25 firsthand the litigiousness of Mr. Dondero and his related

1 entities. And the Court heard testimony from Mr. Tauber and  
2 Aon that the D&O insurance will not be available post-  
3 effective date without assurances that the gatekeeper  
4 provision will be in effect for the duration of the policy and  
5 any run-off period.

6 Mr. Tauber further testified that he expected the final  
7 terms from the insurance carrier to provide that if the  
8 confirmation order was reversed on appeal and the gatekeeper  
9 was removed, it would void -- it would either void the  
10 directors and officers coverage or it'd result in a Dondero  
11 exclusion.

12 Mr. Dondero and his entities are no strangers to the  
13 appellate process, as Your Honor knows. They appealed several  
14 of your orders, and continue the tack in this case, having  
15 appealed the Acis and the HarbourVest orders and the  
16 preliminary injunction. It would not surprise the Debtor if  
17 Mr. Dondero and his entities appealed your confirmation order,  
18 if Your Honor decides to confirm the plan.

19 The Debtor is confident that it will prevail on any appeal  
20 in the confirmation order, as we believe the Debtor has made a  
21 compelling case for confirmation.

22 The Debtor also believes a compelling case exists that if  
23 the plan went effective without a stay pending appeal, that  
24 the appeal would be equitably moot, but we understand we are  
25 facing headwinds from the courts, bankruptcy court have

1 addressed that issue before.

2       However, given the effect a reversal would have on the  
3 availability of insurance coverage, the Claimant Trustee, the  
4 Claimant Oversight Committee, and the Litigation Trustee are  
5 just not willing to take that risk.

6       We are hopeful that Mr. Dondero and his entities will  
7 recognize that any appeal is futile and step aside and let the  
8 plan proceed and become effective.

9       If Mr. Dondero and his related entities do appeal the  
10 confirmation order, preventing it from becoming final and  
11 preventing the effective date from occurring, the Debtor  
12 intends to work closely with the Committee to ratchet down  
13 costs substantially and proceed to operate and monetize assets  
14 as appropriate until an order becomes final.

15       None of these modifications adversely affect the treatment  
16 of claims or interests under the plan, Your Honor, and for  
17 those reasons, Your Honor, we request that the Court approve  
18 those modifications.

19       And with that, I would like to turn the podium over to Mr.  
20 Kharasch to briefly address the remaining CLO objections.

21           THE COURT: All right. Mr. Kharasch?

22           CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

23           MR. KHARASCH: Good afternoon, Your Honor. I'll be  
24 as brief as possible. I know we're under a deadline.

25           As you've heard yesterday, you've heard before in other

1 proceedings, Your Honor, the CLO Objecting Parties, the so-  
2 called investors, do have rights under the CLO management  
3 agreements and indentures, including contractual rights to  
4 terminate the management agreements under certain  
5 circumstances.

6 What they complain about today, Your Honor, is that the  
7 injunction language in the plan, including the language  
8 preventing actions to interfere with the implementation and  
9 consummation of the plan, is so broad and ambiguous that their  
10 rights are or may be improperly impacted, especially any  
11 rights to remove the manager for acts of malfeasance.

12 But the Debtor is primarily relying, Your Honor, not so  
13 much on the plan injunctions but on the clear provisions of  
14 the January 9 order, to which Mr. Dondero consented and which  
15 provides that Mr. Dondero shall not cause any of his related  
16 entities to terminate any agreements with the Debtor.

17 Yes, that is a broad provision, but it is very clear, and  
18 it does not even allow the CLO Objecting Parties to come to  
19 court under a gatekeeper-type provision. But that is what Mr.  
20 Dondero consented to on behalf of himself and his related  
21 entities.

22 Important to note, Your Honor, we are not here today to  
23 litigate who is and who is not a related entity. That will be  
24 left for another day. However, Your Honor, we have considered  
25 these issues, including last night and this morning, and we

1 are going to propose -- well, we will modify our plan through  
2 a provision in the confirmation order to provide the  
3 following: Notwithstanding anything in the plan or the  
4 January 9 order, the CLO Objecting Parties will not be  
5 precluded from exercising their contractual or statutory  
6 rights in the CLOs based on negligence, malfeasance, or any  
7 wrongdoing, but before exercising such rights shall come to  
8 this Court to determine whether those rights are colorable and  
9 to also determine whether they are a related entity. If the  
10 Court has jurisdiction, the Court can determine the underlying  
11 colorable rights or claims.

12 This does not impact the separate settlement we have with  
13 CLO Holdco, Your Honor.

14 We think that such modification addresses some of the  
15 concerns raised yesterday by the objecting parties by  
16 providing more clarity as to what the plan is doing and not  
17 doing with respect to the plan and the January 9 order, and we  
18 think it is also a fair resolution of some legitimate  
19 concerns.

20 So, with that, Your Honor, we think that, with that  
21 clarification that we did not have to make but are willing to  
22 make, that this should fully satisfy the CLO Objecting Parties  
23 with regard to their objections to the injunction and the  
24 gatekeeper.

25 Thank you, Your Honor.

1 THE COURT: All right. Mr. Clemente?

2 CLOSING ARGUMENT ON BEHALF OF THE CREDITORS' COMMITTEE

3 MR. CLEMENTE: Yes, Your Honor. And I actually am  
4 going to be brief. Mr. Pomerantz's discussion, obviously, was  
5 very, very thorough, so I'm able to cut out a lot of stuff.

6 Thank you, Your Honor. Matt Clemente, Sidley Austin, on  
7 behalf of the Committee.

8 The plan, Your Honor, meets the confirmation standards and  
9 should be confirmed. Mr. Pomerantz covered a lot of ground,  
10 and I will endeavor not to repeat that, but there are a few  
11 points that I think the Committee wishes to emphasize.

12 Your Honor, since I first appeared in front of you, I have  
13 maintained consistently that no plan can or should be  
14 confirmed without the consent of the Committee. Your Honor,  
15 in her wisdom, understood this immediately, as it was obvious  
16 -- it was the obvious conclusion, given the makeup of the  
17 creditor body, the asset pool, and the impetus for the filing  
18 of the case.

19 Unfortunately, not everyone came to this conclusion so  
20 easily, and it took much hard-fought negotiations as well as a  
21 defeated disclosure statement, among other things, and  
22 tireless dedication and commitment by each individual  
23 Committee member to drive for a value-maximizing plan that is  
24 in the best interests of its constituencies and for us to get  
25 to where we are today.

1       And where we are today, Your Honor, is at confirmation for  
2 a plan that the Committee unanimously supports, which was the  
3 inevitable outcome for this case from the very beginning.

4       I've also said, Your Honor, that context is critical in  
5 this case. It has been from the beginning, and it remains so  
6 now. Mr. Draper, interestingly, began his comments yesterday  
7 by saying that even a serial killer is entitled to *Miranda*  
8 rights. While I will admit that at times the rhetoric in this  
9 case has been heated, I have never certainly likened Mr.  
10 Dondero to a serial killer. But the record shows, and Mr.  
11 Dondero's own words and actions show, that he is, in fact, a  
12 serial litigator who has no hesitation at all to take any  
13 position in an attempt to leverage an outcome that suits his  
14 self-interest. And he has no hesitation at all to use his  
15 many tentacles in a similar fashion.

16       That is a very important context in which the Court should  
17 view the remaining objections of the Dondero tentacles and  
18 weigh confirmation of the Debtor's plan.

19       Against this context of a serial litigator, Your Honor, we  
20 have a plan supported by each member of the Official Committee  
21 of Unsecured Creditors, accepted by two classes of claims,  
22 Class 2 and Class 7, and holders of almost one hundred percent  
23 in amount of non-insider claims in Class 8.

24       The parties that have voted against the plan are either  
25 employees who are not receiving distributions under the plan

1 or are insiders or parties related to Mr. Dondero.

2       The overwhelming number and amount of creditors who are  
3 receiving distributions under this plan, therefore, have  
4 accepted the plan. The true creditors and economic parties in  
5 interest have spoken, they have spoken loudly, and they have  
6 spoken in favor of confirming the plan.

7       Your Honor, I'm not going to address the technical  
8 requirements, as Mr. Pomerantz did that. So I'm going to skip  
9 over my remarks in that regard, except I do want to emphasize  
10 the remarks regarding the gatekeeper, exculpation, and  
11 injunction provisions as they're of critical importance to the  
12 plan.

13       The testimony has shown and the proceedings of this case  
14 has shown, again, Mr. Dondero is a serial litigator with a  
15 stated goal of causing destruction and delay through  
16 litigation.

17       The testimony has further shown that none of the  
18 independent board members would have signed onto the role  
19 without the gatekeeper and injunction provisions and the  
20 indemnity from the Debtor.

21       Therefore, it follows that such provisions are necessary  
22 to entice parties to serve in the Claimant Trustee and other  
23 roles under the plan, which, as I remarked in my opening  
24 comments, are integral to providing the structure that the  
25 creditors believe is necessary to unlocking the value and

1 unlocking themselves from the Dondero web.

2         Regarding the exculpation and injunction provisions  
3 specifically, Your Honor, the Court will recall that the  
4 Committee raised objections to them in connection with the  
5 first disclosure statement hearing. In response, the Debtor  
6 narrowed the provisions, and the Committee believes they  
7 comply with the Fifth Circuit precedent, as Mr. Pomerantz ably  
8 walked Your Honor through.

9         And to be clear, Your Honor, not only does the Committee  
10 believe the exculpation and injunction provisions comply with  
11 Fifth Circuit law, the Committee does not believe the estate  
12 is harmed by such provisions, as the Committee does not  
13 believe there are any cognizable claims that could or should  
14 be raised that would otherwise be affected by the exculpation  
15 or injunction, and, frankly, with respect to the release that  
16 Mr. Pomerantz walked Your Honor through with respect to the  
17 directors and the officers.

18         Regarding the gatekeeper, Your Honor, Your Honor  
19 presciently approved it in her January 9th order, and the  
20 developments since then only serve as further justification  
21 for including it in the plan and confirmation order. Mr.  
22 Dondero is a serial and vexatious litigator, and the  
23 instruments put in place under the plan to maximize value for  
24 the creditors and to oversee that value-maximizing process  
25 must be protected, and the gatekeeper function serves that

1 protection while also, importantly, as Mr. Pomerantz pointed  
2 out, providing Mr. Dondero with a forum to advance any  
3 legitimate claims he and his tentacles may have.

4 In short, Your Honor, the gatekeeper provision is  
5 necessary to the implementation to the plan, is fair under the  
6 circumstances of the case, and is therefore within this  
7 Court's authority, and it is appropriate to approve.

8 Your Honor, in sum, it has been a long road to get here  
9 today, but we are finally here. And we are here, Your Honor,  
10 I believe in large part as a result of the tireless efforts of  
11 the individual members of my Committee, and for that I thank  
12 them.

13 The Committee fully supports and unanimously supports  
14 confirmation of the plan. As demonstrated by the evidence,  
15 the plan meets all the requirements of the Bankruptcy Code.  
16 The Committee believes the plan is in the best interests of  
17 its constituencies. And therefore the Committee, along with  
18 two classes of creditors and the overwhelming amount of  
19 creditors in terms of dollars, urge you to confirm the plan.

20 That's all I have, Your Honor, but I'm happy to answer any  
21 questions you may have for me.

22 THE COURT: Okay. Not at this time.

23 Nate, how much time --

24 (Clerk advises.)

25 THE COURT: Twenty-five minutes remaining? All

1 right. Just so you know, you've got a collective Debtor's  
2 counsel/Committee's counsel 25 minutes remaining for any  
3 rebuttal, if you choose to make it.

4 Let's take a five-minute break, and then we'll hear the  
5 Objectors' closing arguments. Okay.

6 THE CLERK: All rise.

7 (A recess ensued from 2:00 p.m. until 2:06 p.m.)

8 THE COURT: All right. Please be seated. We're  
9 going back on the record in Highland. We're ready to hear the  
10 Objectors' closing arguments. Who wants to go first?

11 MR. DRAPER: Your Honor, this -- this is Douglas  
12 Draper. I get the joy of going first.

13 THE COURT: Okay.

14 CLOSING ARGUMENT ON BEHALF OF THE GET GOOD AND DUGABOY TRUSTS

15 MR. DRAPER: We've heard a great deal of testimony  
16 about the Debtor's belief that the circumstances in this case  
17 warrant an exception to existing Fifth Circuit case law, the  
18 Bankruptcy Code, and Court's post-confirmation jurisdiction.

19 I would not be standing here today objecting to the plan  
20 if the Debtor didn't attempt to extend, move past and beyond  
21 the Barton Doctrine, move beyond 1141, move beyond *Pacific*  
22 *Lumber*. In fact, I think I heard an argument that *Pacific*  
23 *Lumber* is not applicable and this Court should disregard Fifth  
24 Circuit case law.

25 Let's start with the exculpation provision. And the focus

1 of this case has been, and what we've heard over the last few  
2 days, is about the independent directors. I understand there  
3 was an order entered earlier, the order stands, and the order  
4 is applicable in this case. It cuts off, however, when we  
5 have a Reorganized Debtor, because these independent directors  
6 are no longer independent directors. It cuts off when we have  
7 a new general partner.

8 And so the protections that were afforded by that order do  
9 not need to be afforded to the new officers and new directors  
10 of the new general partner. And in fact, the protections that  
11 they're entitled to are completely different than the  
12 protections that were entitled -- that are covered by the  
13 order that the Court has looked at.

14 Let's first focus on, however, the exculpation provision.  
15 And I wanted to ask the Court to look at the exculpated  
16 parties. Have to be very careful and very interest -- and  
17 focus solely on the independent directors. But if you look at  
18 the parties covered by exculpation provision, it includes the  
19 professionals retained by the Debtor. My reading of *Pacific*  
20 *Lumber* is that neither the Creditors' Committee counsel nor  
21 the Debtor can be covered by an exculpation provision. This  
22 in and of itself makes the plan non-confirmable. This  
23 exculpation provision is unwarranted and unnecessary.

24 Two, --

25 THE COURT: Well, let's drill down on that.

1 MR. DRAPER: -- we have --

2 THE COURT: Let's drill down on that. Mr. Pomerantz  
3 says that this wasn't what they considered one way or another  
4 by *Pacific Lumber*. Debtor, debtor professionals. Okay? Do  
5 you disagree with that?

6 MR. DRAPER: I disagree with that. *Pacific Lumber*  
7 said you could only have releases and exculpations for the  
8 Creditors' Committee members. And the rationale behind that  
9 was that those people volunteered to be part and parcel of the  
10 bankruptcy process, that those parties did not get paid.  
11 Here, we have two professionals who both volunteered and are  
12 being paid, and are not entitled to an exculpation under  
13 *Pacific Lumber*. They're not entitled to a --

14 THE COURT: Okay. So you say *Pacific* --

15 MR. DRAPER: -- release. Now, ultimately, they --

16 THE COURT: -- *Pacific Lumber* categorically rejected  
17 all exculpations except to Creditors' Committee and its  
18 members. That's your --

19 MR. DRAPER: I agree. That's --

20 THE COURT: -- interpretation of *Pacific Lumber*?

21 MR. DRAPER: Yes.

22 THE COURT: Okay. All right. So you just absolutely  
23 disagree, one by one, with every one of the arguments, that it  
24 was really -- the only thing before the Fifth Circuit was plan  
25 sponsors, okay? A plan proponent that I think was like a

1 competitor previously of the debtor, and I think a large  
2 creditor or secured creditor. I think those were the two plan  
3 proponents.

4 So you disagree -- I'm going to, obviously, go back and  
5 line-by-line pour through *Pacific Lumber*, but you disagree  
6 with Mr. Pomerantz's notion that, look, it was really a page  
7 and a half or two of a multipage opinion where the Fifth  
8 Circuit said, no, I don't think 524(e) is authority to give  
9 exculpation from postpetition liability for negligence as to  
10 these two plan sponsors. And I guess it was also -- I don't  
11 know. They say, Pachulski's briefing says it was really only  
12 looking at these two plan sponsors and the Committee and its  
13 members on appeal, you know, going through the briefing, and  
14 in such, you can see that these were all that was presented  
15 and addressed by the Fifth Circuit. You disagree with that?

16 MR. DRAPER: Look, I know the facts of *Pacific Lumber*  
17 and they -- I know what the posture of the case was. However,  
18 the literal language by the opinion in it, it transcends just  
19 a dispute in the case. And I think the U.S. Trustee's  
20 position that this exculpation provision is correct as a  
21 matter of law support -- is further evidence of the fact that  
22 the U.S. Trustee, as watchdog of this process, and *Pacific*  
23 *Lumber* say this cannot be done, period, end of story.

24 THE COURT: Okay. So you, at bottom, just totally  
25 disagree with Mr. Pomerantz? You say *Pacific Lumber* is

1 actually a very broad holding, and I guess, if such, there's a  
2 conflict among the Circuits, right?

3 MR. DRAPER: Well, that's okay.

4 THE COURT: So, --

5 MR. DRAPER: I mean, quite frankly, *Pacific Lumber* is  
6 binding on you.

7 THE COURT: Understood.

8 MR. DRAPER: There may be a conflict in the Circuits,  
9 and ultimately the Supreme Court may make a decision and  
10 decide who's right and who's wrong.

11 But for purposes of today and for purposes of this  
12 exculpation provision and for purposes of this confirmation,  
13 *Pacific Lumber* is the applicable law.

14 THE COURT: Okay. Well, again, this is a hugely  
15 important issue, although in many ways I don't understand why  
16 it is, because we're just talking about postpetition acts and  
17 negligence, okay? You know, many might say it's much ado  
18 about nothing, but it's front and center of your objection.  
19 So I guess I'm just thinking through, if the Fifth Circuit was  
20 presented these exact facts and was presented with the  
21 argument, you know, the *Blixseth* case says 524(e) has nothing  
22 to do with exculpation because exculpation is a postpetition  
23 concept, and it's just talking about standard liability --  
24 these people aren't going to be liable for negligence; they  
25 can be liable for anything and everything else -- if presented

1 with that *Blixseth* case, you know, there are several arguments  
2 that Mr. Pomerantz has made why, if you accept that 524(e)  
3 might not apply here, let's look at the reasoning, the little  
4 bit of reasoning we had of *Pacific Lumber*, that it was really  
5 a policy rationale, right? These independent fiduciaries,  
6 strangers to the company and case, they'd never want to do  
7 this if they knew they were vulnerable for getting sued for  
8 negligence. Mr. Pomerantz's argument is that these  
9 independent board members are exactly analogous to a  
10 Committee, more than prepetition officers and directors. What  
11 do you have to say about that policy argument?

12 MR. DRAPER: Well, I think there's a huge distinction  
13 between the members of a Creditors' Committee who are  
14 volunteers and are not paid versus a paid independent  
15 director. And more importantly, I think there's a huge  
16 difference between a member of a Creditors' Committee who's  
17 not paid and counsel for a Debtor and counsel for a Creditors'  
18 Committee.

19 THE COURT: Okay.

20 MR. DRAPER: Look, you have -- you've --

21 THE COURT: So, at bottom, it was all about  
22 compensation to the Fifth Circuit?

23 MR. DRAPER: Well, no. The Fifth Circuit policy  
24 decision was we want to protect a party who wants to serve and  
25 do their civic duty to serve on a Creditors' Committee for no

1 compensation. I agree with that. I think it's a laudable  
2 policy decision. I think it makes sense.

3 However, the Fifth Circuit in its language basically said,  
4 nobody else gets it. It didn't say, look, you know, if there  
5 are circumstances that are different, we may look at it  
6 differently. The language is absolute in the opinion. And  
7 that's what I think is binding and I think that's what the  
8 case stands for.

9 And look, just so the Court is very clear, when Pachulski  
10 files its fee application and the Court grants the fee  
11 application, any claim against them is res judicata. So, in  
12 fact, they do have -- they do have protection. They do have  
13 the ability to get out from under. The Court -- they're just  
14 not -- they just can't get out from under through an  
15 exculpation provision. And the same goes for Mr. Clemente and  
16 his firm.

17 THE COURT: Which, --

18 MR. DRAPER: And the same goes for DSI.

19 THE COURT: Which, by the way, that's one reason I  
20 think sometimes this is much ado about nothing. It goes both  
21 ways. The Debtor professionals, the Committee professionals,  
22 estate professionals, they're going to get cleared on the day  
23 any fee app is approved, right? I mean, there's Fifth Circuit  
24 law that says --

25 MR. DRAPER: I -- I --

1           THE COURT: -- says that's res judicata as to any  
2 future claims.

3           But I guess I'm really trying to understand, you know, at  
4 bottom, I feel like the Fifth Circuit was making a holding  
5 based on policy more than any directly applicable Code  
6 provision.

7           I mean, it's been said, for example, that Committee  
8 members, they're entitled to exculpation because of, what,  
9 1103, some people argue, 1103, which subsection, (c)? That's  
10 been quoted as giving, quote, qualified immunity to  
11 Committees. But it doesn't really say that, right? It's just  
12 something you infer.

13           MR. DRAPER: No. Look, what I think, if you really  
14 want to put the two concepts together, I think what the Fifth  
15 Circuit, when they told lawyers and professionals that you  
16 can't get an exculpation, was very mindful of the fact that  
17 you can get released once your fee app is approved. So, as a  
18 policy, they didn't need to do it in a exculpation provision.  
19 There was another methodology in which it could be done.

20           THE COURT: Uh-huh.

21           MR. DRAPER: And so that's -- you have to look at it  
22 as holistic and not just focus on the exculpation provision.  
23 Because, in fact, they recognize and they -- I'm sure they  
24 knew their existing case law on res judicata, and that's why  
25 they read it out.

1           So, honestly, there's no reason for Pachulski to be in  
2 here. There's no reason for Mr. Clemente to be in here.  
3 There's no reason for the professionals employed by the Debtor  
4 to be in here. They have an exit not by virtue of the plan.

5           THE COURT: But so then it boils down to the  
6 independent directors and Strand post January 9th?

7           MR. DRAPER: It boils down somewhat to them, but  
8 quite frankly, there are two parts to this. One is you have  
9 an order that's in place. I am not asking the Court to  
10 overturn the order. And quite frankly, this provision could  
11 have been written to the effect that the order that was in  
12 place on -- that's been presented to the Court is applicable  
13 and applied.

14           However, let's parse that down. Let's look at Mr. Seery.  
15 The order that's in place solely protects the independent  
16 directors acting in their capacities as independent directors.  
17 If somebody's acting as -- and if you want to liken it to a  
18 trustee, their protection is afforded by the Barton Doctrine,  
19 and that's how the protection arises.

20           What's going on here is they're extending the provisions,  
21 first of all, of the Court's order, and number two, of the  
22 Barton Doctrine, which are -- which cannot be -- which should  
23 not be extended. The law limits what protections you have and  
24 what protections you don't have. And we, as lawyers -- look,  
25 I'll give you the best example. Think of all the times you

1 had somebody write in the concept of superpriority in a cash  
2 collateral order. And how many times have you had a lawyer  
3 rewrite the concept of the issue as to diminution in value?  
4 The Code says diminution in value, and quite frankly, a cash  
5 collateral order should just say if, to the extent there's  
6 diminution in value, just apply the Code section. It's  
7 written there. Smart people put it in, and Congress approved  
8 it. And once you start getting beyond that, those things  
9 should be limited.

10       And what we have are lawyers trying to extend out by  
11 definitions things that the Code limits by its reach. That  
12 goes for post-confirmation jurisdiction. That goes for the  
13 injunction. That goes for the so-called gatekeeper provision.

14       And so, again, I would not be here if, in fact, they had  
15 said, we have an injunction to the full extent allowed by the  
16 Bankruptcy Code and *Pacific Lumber*. We have an exculpation  
17 provision that's allowed by virtue of the Court's order. We  
18 have the full extent and full reach of the Barton Doctrine.  
19 Those are legitimate. Once you start expanding upon that,  
20 you're reaching into matters that are not authorized and not  
21 allowed.

22       And then you get into 105 territory, which is always very  
23 dangerous. And that's really what's going on here. And  
24 that's the tenor of my argument and what I'm trying to say.  
25 The Code gives protections. It is not for us to extend the

1 protections. It's not for us to enlarge them, even under a,  
2 gee, the other party's litigious.

3 And so that's -- let's take *Craig's Store*. Attempted to  
4 limit its reach. *Craig's Store* says once you have a confirmed  
5 plan, any dispute between the parties, for -- let's take an  
6 executory contract. If there's a breach of the executory  
7 contract, that's a matter to be handled aft... by another  
8 court. It's not a matter to be handled by this Court. This  
9 Court lets the parties out.

10 And in this case, it's even worse, because you basically  
11 have a new general partner coming in, you have an assumption  
12 of various executory contracts, and you have a -- Strand is no  
13 longer present.

14 If you adopted Mr. Seery's argument, anybody who appeals a  
15 decision, questions what he does or how he does it, is a  
16 vexatious litigator. That's not the case. And the fact that  
17 we are appealing a decision is a right that we have. It  
18 shouldn't be limited, and it shouldn't be held against us.  
19 Courts can rule against us. That's fine.

20 And so that's really what the focus is here and that's why  
21 I gave the opening that I had. We are willing to be bound by  
22 applicable law. And quite frankly, the concept that the  
23 exigencies of a case allow a court to change what applicable  
24 law is is problematic. I gave the criminal example as a  
25 reason. And the reason was that, in certain instances, the

1 application of law may allow a criminal to go free. It's a  
2 problem with our system and how we work, but that's what the  
3 law does, and it is absolute in its application.

4 Let me address the so-called gatekeeper provision. The  
5 gatekeeper provision, in a certain sense, is recognized in the  
6 Barton Doctrine. It's jurisdictional, and it says, to the  
7 extent you're going to litigate with somebody who served  
8 during the bankruptcy, who was a trustee, then you have to  
9 come to the bankruptcy court and pass through a gate. It  
10 doesn't say you have to pass through a gate for a reorganized  
11 debtor who does something after a plan is confirmed and going  
12 forward. And so that's -- there's a distinction.

13 And if you look at Judge Summerhays' decision, which I  
14 will be happy to send to the Court, in *WRT* involving -- it's  
15 kind of (indecipherable) and Mr. Pauker, where, in that case,  
16 the trustee, the litigation trustee, spent more litigating  
17 than it had in recoveries, and Baker Hughes filed suit. Judge  
18 Summerhays said, look, the Barton Doctrine only applies to a  
19 certain extent. It is limited once you get into post-  
20 confirmation matters and related-to jurisdiction.

21 And so, again, the Barton Doctrine is what it stands for.  
22 We agree with it, we recognize it, and it should be applied.  
23 The Barton Doctrine, however, should not be extended, should  
24 not go past its reach, and should not go past the grant of  
25 jurisdiction for this Court.

1       And so you have in here, though they have -- they have  
2 tried to hide it in a limited fashion, this gatekeeper  
3 provision. The gatekeeper provision, as currently written,  
4 covers post-confirmation claims that somebody has to come  
5 before this Court to the extent there's a breach of a  
6 contract. That's not proper, and it's not covered by your  
7 post-confirmation jurisdiction. To the extent there's an  
8 interpretation of an existing contract and an interpretation  
9 of the order, you do have authority, and I don't question  
10 that.

11           THE COURT: But address Mr. Pomerantz's statement  
12 that there's a difference between saying you have to go to the  
13 bankruptcy court and make an argument, we have a colorable  
14 claim that we would like to pursue, and having that  
15 jurisdictional step required. There's a difference between  
16 that and the bankruptcy court adjudicating the claim.

17           MR. DRAPER: Well, there are two parts to that.  
18 Number one is there's an injunction in place from an action  
19 taken post-confirmation against property of the estate. We  
20 all agree at that, correct? And we believe that the  
21 injunction applies to post-confirmation action against  
22 property of the pre-confirmation estate. We all agree to  
23 that.

24           However, if in fact there's a breach of a contract  
25 postpetition that the parties have a dispute about, that

1 contract is now no longer under your purview once the contract  
2 has been assumed. And so they shouldn't have to make a  
3 colorable claim to you that a breach of the contract has  
4 occurred. That should be the determining factor for another  
5 court.

6 That's, in essence, what *Craig's Store* says. Your  
7 jurisdiction and the jurisdiction of a bankruptcy court is  
8 limited. It's limited by *Stern vs. Marshall*. It's limited by  
9 your ability to render findings of fact and conclusions of law  
10 versus render a final decision. That decision has been made  
11 not by us, it's been made by Congress and it's been made by  
12 the United States Constitution.

13 THE COURT: All right. And I think we all agree with  
14 you regarding the holding of *Craig's Stores* and some of the  
15 other post-confirmation bankruptcy subject matter jurisdiction  
16 holdings. But Mr. Pomerantz is arguing that this gatekeeping  
17 function is warranted by, among other things, you know, there  
18 was a district court holding, *Baum v. Blue Moon*, or a Fifth  
19 Circuit case, that upheld a district court having the ability  
20 to impose pre-filing injunctions in the context of a vexatious  
21 litigator. So, you know, that's a strong analogy he makes to  
22 what's sought here. What is your response to that?

23 MR. DRAPER: My response to that is a district court  
24 can do that. A district court has jurisdiction to make that  
25 decision. And quite frankly, a district court can sanction a

1 vexatious litigator under Rule 11.

2       So, in fact -- again, you have to bifurcate your power  
3 versus the power that a district court has. And that  
4 gatekeeper provision is allowed by a district court because  
5 they had authority over the case. You may not have authority  
6 over being the gatekeeper for a post-confirmation matter that  
7 you had no jurisdiction over to start with.

8           THE COURT: Okay.

9           MR. DRAPER: That, that's the distinction between  
10 here. That's -- what's going on here is they are -- they are  
11 mashing together a whole load of concepts under the vexatious  
12 litigator and the anti-Dondero function that fundamentally  
13 abrogate the distinction between what your jurisdiction is  
14 pre-confirmation versus your jurisdiction post-confirmation.  
15 And that --

16           THE COURT: Do you think --

17           MR. DRAPER: -- is sacrosanct.

18           THE COURT: Do you think Judge Lynn got it wrong in  
19 *Pilgrim's Pride*? Do you think Judge Houser got it wrong in  
20 CHC? Or do you think this situation is different?

21           MR. DRAPER: There are two parts to that. I have  
22 told Judge Lynn, since I have been working with him, that I  
23 think *Pilgrim's Pride* is wrongfully decided. However, having  
24 said that, *Pilgrim's Pride* and those cases dealt with claims  
25 against the -- the channeling injunction affected actions

1 during the bankruptcy. It did not serve as a post-  
2 jurisdictional grant of jurisdiction to the bankruptcy court.  
3 It did not pose as an ability -- as a limitation on a post-  
4 confirmation litigator or a post-effective date litigator to  
5 address a wrong done to them by an independent director of a  
6 general partner.

7 In a sense, Judge Lynn's determination, and Judge Houser,  
8 is consistent somewhat with the Barton Doctrine. Now, do I  
9 agree that they're right? No. But I understand the decision  
10 and I understand the context in which it was rendered and I  
11 don't have a huge problem with it.

12 So, again, let's parse what we're trying to do here.  
13 Number one, we are -- we have to bifurcate post-confirmation  
14 jurisdiction or post-effective date jurisdiction and what you  
15 can do as a post-effective date arbiter versus what you could  
16 do pre-effective date and pre-effective date claims. And  
17 again, that's the problem with what's written here. It is  
18 designed one hundred percent to expand your post-effective  
19 date jurisdiction through both the gatekeeper provision and  
20 the jurisdictional grant that's here from your pre-effective  
21 date capability, your pre-effective date jurisdiction, and  
22 your pre-effective date ability to either curb a claim or not  
23 to curb a claim. And that, that's the issue.

24 And again, let's start talking about the independent  
25 directors. I recognize, again, that there's an order there.

1       But if Mr. Seery -- let's take Mr. Seery -- is acting as a  
2       director of Strand but is also an accountant for the Debtor  
3       and makes a mistake, he would be sued in his capacity as the  
4       accountant for the Debtor, not as an independent director of  
5       Strand. That distinction needs to be made.

6           What we are doing here under this plan, and what's been  
7       argued by Mr. Pomerantz, is too broad a brush. It needs to be  
8       cut back. The Court needs to take a very hard look at what's  
9       being presented here.

10          And again, the Court's order is very clear. And this is  
11       binding. I recognize that. But the protection they got was  
12       serving as an independent director. The protection they  
13       didn't get was -- let's take Mr. Seery, if Mr. Seery was  
14       serving as an accountant and blew a tax return. Those are  
15       distinctions that warrant analysis and warrant looking at  
16       here. And again, it is too broad a brush that's touted here,  
17       and that is why this plan on its face is not confirmable with  
18       respect to both the post-confirmation jurisdiction, the  
19       gatekeeper provision, the exculpation provisions.

20          And so let me address a few other things, just to address  
21       them. Number one, the argument has been made with respect to  
22       the creditors and the resolicitation issue and that creditors  
23       could have come in looking, seen, followed the case, and  
24       basically calculated and made the same calculation that the  
25       Debtor made when they filed this and put forth the new plan

1 analysis versus liquidation analysis. And then they've also  
2 made the argument, well, nobody came and complained. Well,  
3 two parts to that.

4 Number one, as you know, a disclosure statement needs to  
5 be on its face and should not require a creditor to go back in  
6 and monitor the record -- and quite frankly, in this record,  
7 there are thousands of pages -- and do the calculation  
8 himself. This was incumbent upon the Debtor to possibly  
9 resolicit when these material changes took place.

10 Number two, the recalculation has not been subject to the  
11 entire creditor body seeing it. And anybody who wanted to  
12 call them would have had to have seen the document they filed  
13 on February 1st and made a telephone call basically  
14 contemporaneous with seeing it.

15 Those are two things. The argument that they didn't call  
16 me is just nonsensical. There's nobody -- you, you are  
17 sitting here -- and I've had a number of battles over the  
18 years with Judge (indecipherable), who was -- who -- and her  
19 view was, I'm here to protect the little guy who's not --  
20 didn't hire counsel, who's not represented by Mr. Clemente and  
21 his huge clients who have voted in favor of the plan. It's  
22 the little person, i.e., the employees who would vote against  
23 a plan that they so -- so desperately tried to get out from  
24 under.

25 THE COURT: Well, --

1 MR. DRAPER: It's really a function --

2 THE COURT: -- Mr. Pomerantz argues it's not as  
3 though there was a materially adverse change in treatment; it  
4 was the disbursement estimate. And doesn't every Chapter 11  
5 plan -- most Chapter 11 plans, not every -- they make an  
6 estimate. I mean, and it's, frankly, it's very often a big  
7 range of recovery, right, a big range of recovery, because we  
8 don't know what the allowed claims are going to compute to at  
9 the end of the day. There's obviously liquidation of assets.  
10 We don't know. Isn't this sort of like every -- not, again,  
11 not every other plan, but most other plans -- where there's a  
12 big range of possible estimated distributions? I mean, this  
13 wasn't a change in treatment, right?

14 MR. DRAPER: Well, let me address that. There are  
15 two parts to that. Most plans I see that contain some sort of  
16 analysis have a range. This one doesn't have a range. What  
17 they've done is they've buried in a footnote or assumption  
18 that these numbers may change. So had they said, look, your  
19 recovery can go from 60 cents to 85 cents, God bless, they  
20 probably would have been right.

21 Number two, which is more problematic to me, to be honest  
22 with you, is the fact that, number one, the operating expenses  
23 have increased over a hundred percent. And number two, the  
24 Debtor has made a determination post-disclosure statement and  
25 pre-hearing that they're going to change their model of

1 business.

2       The original disclosure statement said we're not going to  
3 get into the managing CLO part of the business and we're going  
4 to let these contracts go. However, at some point along the  
5 way, they made a change. I don't know to this day, because I  
6 was never furnished the backup to the expense side. I  
7 understand what they said why they didn't give me the asset  
8 side, but the expense side, they should have given me, and I  
9 did ask for.

10      But, you know, what we have now is a more fundamental  
11 problem with the execution of the plan and the expectation  
12 that creditors -- what they're going to get, because, in fact,  
13 the expense items have doubled.

14      I think creditors were entitled to know that, rather than  
15 it having been sprung upon everybody, when I got it the day  
16 before a deposition. And so those are things that I think  
17 warranted a change in solicitation. Now, the result may have  
18 been the same. I don't know. More people may have voted  
19 against the plan. More people may have opted in from Class 8  
20 to Class 7, I mean, based upon that information. That  
21 information was not provided to them.

22      And so I look at two -- three things. One is a range  
23 could have been given, and they probably would have been a  
24 whole lot better off. Two, you have a material change in  
25 expenses. And three, you have a material change in business

1 model. Three things that occurred between November and this  
2 confirmation hearing. Three things that were not known by the  
3 creditor body and not told to them.

4 THE COURT: Mr. Draper, I --

5 MR. DRAPER: Now, it may have been told --

6 THE COURT: I don't want to belabor this any more  
7 than I think we need to, but I've got a Creditors' Committee  
8 with very sophisticated professionals, very sophisticated  
9 members. They're fiduciaries to this constituency. You know,  
10 you mentioned the little guy. I'm not quite sure who is the  
11 little guy in this case. I think it's a case of all big guys.  
12 But, I mean, they're fine with what's happened here.  
13 Meanwhile, you -- I mean, clarify your standing here for  
14 Dugaboy and Get Good. I mean, --

15 MR. DRAPER: I have --

16 THE COURT: -- I know you have standing. Mr.  
17 Pomerantz did not say you don't have standing. But in  
18 pointing out the economic interests here, I think he said your  
19 clients only have asserted a postpetition administrative  
20 expense. Is that correct?

21 MR. DRAPER: No. I have a post -- I have an -- I  
22 have a claim that's been objected to. I don't think my  
23 economic --

24 THE COURT: A claim of what amount?

25 MR. DRAPER: I think it's \$10 million. But Mr.

1 Pomerantz is right, it requires a looking through the --  
2 through the entity that I had a loan relationship with.

3 I recognize all of those things. I don't think that's  
4 relevant to whether my argument is correct or incorrect. I  
5 have standing to do it. I don't think whether my claim is 50  
6 cents or \$50 million should change the Court's view of whether  
7 the claim is good or bad.

8 THE COURT: Well, I do want to understand, though.  
9 Okay. So you have not asserted an administrative expense,  
10 correct?

11 MR. DRAPER: No. There's been an administrative  
12 expense that's been asserted, --

13 THE COURT: For what?

14 MR. DRAPER: -- but that --

15 THE COURT: For what?

16 MR. DRAPER: I don't have the number in front of me,  
17 Your Honor. I don't -- I don't have those numbers --

18 THE COURT: Okay. Well, then, --

19 MR. DRAPER: -- in front of me. I have asserted --

20 THE COURT: -- what is the concept? What is the  
21 basis for it?

22 MR. DRAPER: It deals with -- Mr. Pomerantz is  
23 absolutely right as to how he's articulated it.

24 THE COURT: I can't remember what he said.

25 MR. DRAPER: It deals with -- it deals with a

1 transaction that's unrelated to the Debtor that deals with  
2 Multi-Strat. I agree with that.

3 THE COURT: Okay. So I remember him saying piercing  
4 the corporate veil. Your trusts -- both of them, one of them,  
5 I don't know -- engaged in a transaction with Multi-Strat that  
6 you say --

7 MR. DRAPER: No, that --

8 THE COURT: -- gave -- okay. Well, you say Multi-  
9 Strat is liable and the Debtor is also liable?

10 MR. DRAPER: No. Let me make two things. The  
11 administrative claim deals with a Multi-Strat transaction that  
12 took place during the bankruptcy. My unsecured claim deals  
13 with a transaction that took place prior to the bankruptcy,  
14 where we lent money to another entity that then funneled money  
15 out into the Debtor. We're -- our contention is that the  
16 Debtor is liable for that loan.

17 THE COURT: All right. So both the administrative  
18 expense as well as the prepetition claim require veil-piercing  
19 to establish liability of the Debtor?

20 MR. DRAPER: Or single business enterprise. I don't  
21 necessarily have to veil-pierce.

22 THE COURT: Okay. I'm not even sure that single  
23 business enterprise is completely available anymore in Texas,  
24 by the Texas legislature doing different things, assuming  
25 Texas law applies. I don't know, maybe Delaware does. But I

1 -- sorry. Just let me let that sink in a little bit. You're  
2 -- okay. Okay. Let me let it --

3 MR. DRAPER: Your Honor, I --

4 THE COURT: -- sink in a little bit.

5 MR. DRAPER: Okay.

6 THE COURT: These trusts -- of which Mr. Dondero is  
7 the beneficiary ultimately, right?

8 MR. DRAPER: Yes. Well, and to --

9 THE COURT: So, your --

10 MR. DRAPER: Again, I have not gone up --

11 THE COURT: The beneficiary of your client --

12 MR. DRAPER: Mr. Dondero is --

13 THE COURT: The beneficiary of your client is  
14 ultimately hoping to succeed on the administrative expense and  
15 the claim on the basis that you should disregard the  
16 separateness of Highland and these other entities?

17 MR. DRAPER: Well, let's take the --

18 THE COURT: When he's resisted that --

19 MR. DRAPER: -- unsecured claim. The --

20 THE COURT: -- in multiple pieces of litigation?

21 Right? I'm sorry. I'm just trying to let this sink in.

22 Okay. If you could elaborate. I'm sorry. I'm talking too  
23 much. You answer me.

24 MR. DRAPER: Okay. What we are saying is that, in  
25 essence, the party we lent the money to was a conduit for the

1 Debtor.

2 THE COURT: Okay. And who was that entity that  
3 either --

4 MR. DRAPER: Highland Select.

5 THE COURT: -- Dugaboy or Get Good lent money to?

6 MR. DRAPER: The Get Good claim is completely  
7 different. The Get Good claim is written as a tax claim.  
8 Honestly, I haven't taken a hard look at it. I will, once we  
9 get through this, and it may be withdrawn. The Dugaboy claim  
10 is a claim that arises through a conduit loan.

11 THE COURT: Okay. But to which entity?

12 MR. DRAPER: Highland Select.

13 THE COURT: Okay. All right. Well, continue with  
14 your argument. I'll get my flow chart out and --

15 MR. DRAPER: Well, let me -- again, I think I've made  
16 the points that I needed to make. I think I've done it in a  
17 sense that you -- what I think the Court needs to do is take a  
18 very hard look at the jurisdictional extension that's being  
19 granted here. I think the exculpation provision, in and of  
20 itself, just by the mere inclusion of Pachulski and the  
21 Debtor's professionals and the Committee professionals, is  
22 just unconfirmable. It has to be stricken.

23 And I think the injunction and the juris... the gatekeeper  
24 provision are not allowed by applicable law. If this plan  
25 merely said, we will enforce the Barton Doctrine, we will

1 abide -- and this order the Court has entered stands, the  
2 injunction that's provided and the rights that we have under  
3 1141 stand, nobody would be objecting. That's why the U.S.  
4 Trustee has objected, because of the expansive nature of what  
5 the -- what's been done in this plan.

6 And with that, I'll turn it over to Mr. Taylor or Davor.

7 THE COURT: All right. Who's next?

8 MR. RUKAVINA: Your Honor, Davor Rukavina. Can you  
9 hear me?

10 THE COURT: I can.

11 CLOSING ARGUMENT ON BEHALF OF CERTAIN FUNDS AND ADVISORS

12 MR. RUKAVINA: Your Honor, thank you. I'll try not  
13 to repeat the arguments from Mr. Draper, but I do want to  
14 point out a couple bigger-picture issues, I think.

15 One, the issue today is not Mr. Dondero, what he has been  
16 alleged to have done, what he is alleged to do in the future.  
17 The Debtor has gone out of its way to create the impression  
18 that we're all tentacles, we're vexatious litigants, we're  
19 frivolous litigants. The issue today is whether this plan is  
20 confirmable under 1129(a) and 1129(b). And I think that that  
21 has to be the focus.

22 Nor is the issue, I think, today any motivation behind my  
23 objection or Mr. Draper's or anything else.

24 And I do take issue that my motivation or my client's  
25 motivation has some ulterior motive for a competing plan or

1       burning down the house or anything like that. It's very, very  
2 simple. My clients do not want \$140 million of their money  
3 and their investors' money, to whom they owe fiduciary duties,  
4 to be managed by a liquidating debtor under new management  
5 without proper staffing and with an obvious conflict of  
6 interest in the form of Mr. Seery wearing two hats.

7           I respect very much that Mr. Seery wants to monetize  
8 estate assets for the benefit of the estate creditors. That's  
9 his job. That's incompatible with his job under the Advisers  
10 Act and, as he said, to maximize value to my clients and over  
11 a billion dollars of investments in these CLOs.

12          That should not be, Your Honor, a controversial  
13 proposition. I should not be described as a tentacle or  
14 vexatious because my clients don't want their money managed by  
15 someone that they, in effect, did not contract with. I may be  
16 -- I may lose that argument. The CLOs have obviously  
17 consented to the assumption. But my argument should not be  
18 controversial. It should not be painted with a broad brush of  
19 somehow being done in bad faith by Mr. Dondero.

20          And in fact, Mr. Seery has admitted that the Debtor and he  
21 are fiduciaries to us. The fact that today they call us  
22 things like tentacles and serial litigants and vexatious  
23 litigants -- we all know what a vexatious litigant is. We've  
24 all dealt with those. The fact that our fiduciary would call  
25 us that just reconfirms that it should have no business

1 managing our or other people's money.

2       And then for what? Mr. Seery has basically said that the  
3 Debtor will make some \$8.5 million in revenue from these  
4 contracts, net out \$4 million of expenses. That's net profit  
5 of \$4.5 million. But then they have to pay \$3.5 million for  
6 D&O insurance and \$525,000 in cure claims. But it's the  
7 Debtor's business decision, not ours.

8       Your Honor, the second issue is the cram-down of Class 8.  
9 There are two problems here: the disparate treatment between  
10 Class 7 and Class 8, which also raises classification, and  
11 then the absolute priority rule. Class 7 is a convenience  
12 class claim -- is a convenience claim, Your Honor, with a \$1  
13 million threshold. Objectively, that is not for  
14 administrative convenience, as the Code allows. And the only  
15 evidence as to how that million dollars was arrived at was,  
16 oh, it was a negotiation of the Committee.

17       There is no evidence justifying administrative  
18 convenience. Therefore, there is no evidence justifying  
19 separate classification. And on cram-down, the treatment has  
20 to be fair and equitable, which *per se* it is not if there is  
21 unfair discrimination. And there is unfair discrimination,  
22 because Class 8 will be paid less.

23       On the absolute priority rule, Your Honor, I think that  
24 it's very simple. I think that the Code is very clear that  
25 equity cannot retain anything -- I'm sorry, equity cannot

1 retain any property or be given any property. Property is the  
2 key word in 1129(b), not value. It doesn't matter that this  
3 property may not have any value, although Mr. Seery said that  
4 it might. What matters is whether these unvested contingent  
5 interests in the trust are property. And Your Honor, they are  
6 property. They have to be property. They are trust  
7 interests.

8 So the absolute priority rule is violated on its face.  
9 There is no evidence that unsecured creditors in Class 8 will  
10 receive hundred-cent dollars. The only evidence is that  
11 they'll receive 71 cents. Mr. Seery said there's a potential  
12 upside from litigation. He never quantified that upside. And  
13 there is zero evidence that Class 8 creditors are likely to be  
14 paid hundred-cent dollars. So, again, you have the absolute  
15 priority rule issue.

16 And this construct where, okay, well, equity won't be in  
17 the money unless everyone higher above is paid in full, that  
18 is just a way to try to get around the dictate of the absolute  
19 priority rule. If that logic flies, then the next time I have  
20 a hotel client or a Chapter 11 debtor-in-possession client  
21 where my equity wants to retain ownership, I'll just create  
22 something like, well, here's a trust, creditors own the trust,  
23 I won't distribute any money to equity, and equity can just  
24 stay in control.

25 The point again is that this is property and it's being

1 received on account of prepetition equity.

2 And there's also the control issue. The absolute priority  
3 rule, the Supreme Court is clear that control of the post-  
4 confirmation equity is also subject to the absolute priority  
5 rule. Here you have the same prepetition management  
6 postpetition controlling the Debtor and the assets.

7 Your Honor, the Rule 2015.3 issue, someone's going to say  
8 that it's trivial. Someone's going to accuse me of pulling  
9 out nothing to make something. Your Honor, it's not trivial.  
10 That's part of the problem in this case, that this Debtor owns  
11 other entities that own assets, and there's been precious  
12 little window given into that during the case, during this  
13 confirmation hearing, and in the disclosure statement.

14 Rule 2015.3 is mandatory. It's a shall. I respect very  
15 much Mr. Seery's explanation that there was a lot going on  
16 with the COVID and with everything and that it just fell  
17 through the cracks. That's an honest explanation. But the  
18 Rule has not been complied with. And 1107(a) requires that  
19 the debtor-in-possession comply with a trustee's duties under  
20 704(a)(8). Those duties include filing reports required by  
21 the Rules.

22 So we have an 1129(a)(3) problem, Your Honor, because this  
23 plan proponent has not complied with Chapter 11 and Title 11.  
24 I'll leave it at that, because I suspect, again, someone will  
25 accuse me of being trivial on that. It is not trivial. It is

1 a very important rule.

2 On the releases and exculpations, Your Honor, I'm not  
3 going to try -- I'm not going to hopefully repeat Mr. Draper.  
4 But there's a couple of huge things here with this exculpation  
5 that takes it outside of any possible universe of *Pacific*  
6 *Lumber*.

7 First, you have a nondebtor entity that is being  
8 exculpated. I understand the proposition that, during a  
9 bankruptcy case, the professionals of a bankruptcy case might  
10 be afforded some protection. I understand that proposition.  
11 But here you have Strand and its board that's a nondebtor.

12 The other thing you have that takes this outside of any  
13 plausible case law is that the Debtor is exculpated from  
14 business decisions, including post-confirmation. I understand  
15 that professionals in a case make decisions, and  
16 professionals, at the end of the case, especially if the Court  
17 is making findings about a plan's good faith, that  
18 professionals making decisions on how to administer an estate  
19 ought to have some protection.

20 That does not hold true for whether a debtor and its  
21 professionals should have protection for how they manage their  
22 business. GM cannot be exculpated for having manufactured a  
23 defective product and sold it during its bankruptcy case.

24 Here, I asked Mr. Seery whether this language in these  
25 provisions, talking about whether the administration of the

1 estate and the implementation of the plan includes the  
2 Debtor's management of those contracts and funds. He said  
3 yes. He said yes. So if you look at the exculpation  
4 provision, it is not limited in time. It affects, Your Honor,  
5 I'm quoting, it affects the implementation of the plan.  
6 That's going forward.

7 So you are exculpating the Debtor and its professionals  
8 from business decisions, including post-confirmation, from  
9 negligence. Well, isn't negligence the number one protection  
10 that people that have invested a billion dollars with the  
11 Debtor have? It's cold comfort to hear, well, you can come  
12 after us for gross negligence or theft. I get that. What  
13 about negligence? Isn't that what professionals do? Isn't  
14 that why professionals have insurance, liability insurance?  
15 It's called professional negligence for malpractice.

16 So this exculpation, let there be no mistake -- I heard  
17 Your Honor's view and discussion -- this is a different  
18 universe, both in space and in time.

19 And we don't have to worry about *Pacific Lumber* too much  
20 because we have the *Dropbox* opinion in *Thru, Inc.* We have  
21 that opinion. Whether it's sound law or not, I don't wear the  
22 robe. But the exculpation provision in that case was  
23 virtually identical. And Your Honor, that's a 2018 U.S. Dist.  
24 LEXIS 179769. In that opinion, Judge Fish -- I don't think  
25 anyone could say that Judge Fish was not a very experienced

1 district court judge -- Judge Fish found that the exculpation  
2 violated Fifth Circuit precedent. That exculpation covered  
3 the debtor's attorneys, the debtor, the very people that Mr.  
4 Pomerantz is now saying, well, maybe the Fifth Circuit would  
5 allow an exculpation for.

6 THE COURT: Well, I think he is relying heavily on  
7 the analogy of independent directors to Creditors' Committee  
8 members, saying that's a different animal, if you will, than  
9 prepetition officers and directors. And he thinks, given the  
10 little bit of policy analysis put out there by the Fifth  
11 Circuit, they might agree that that's analogous and worthy of  
12 an exculpation.

13 MR. RUKAVINA: And they might. And they might. And  
14 again, I usually do debtor cases. You know that. I'd love to  
15 be exculpated.

16 THE COURT: But --

17 MR. RUKAVINA: And I think, again, I do -- I do --

18 THE COURT: -- I really want people to give me their  
19 best argument of why, you know, that's just flat wrong. And  
20 Mr. Draper just said it's, you know, there's a categorical --

21 MR. RUKAVINA: Yeah.

22 THE COURT: -- rejection of exculpations except for  
23 Committee members and Committee in *Pacific Lumber*. And I'm  
24 scratching my head on that one. And partly the reason I am,  
25 while 524(e) was thrown out there, the fact is there's nothing

1 explicitly in the Bankruptcy Code, right, that explicitly  
2 permits exculpation to a Committee or Committee members.  
3 There's just sort of this notion, you know, allegedly embodied  
4 in 1103(c), or maybe there are cases you want to cite to me,  
5 that they're fiduciaries, they're voluntary fiduciaries, they  
6 ought to have qualified immunity.

7 And again, I see it as more of a policy rationale the  
8 Fifth Circuit gave than pointing to a certain statute. So if  
9 it's really a policy rationale, then I think the analogy given  
10 here to a newly-appointed independent board is pretty darn  
11 good.

12 So tell me why I'm all wrong, why Mr. Pomerantz is all  
13 wrong.

14 MR. RUKAVINA: I am not going to tell you that you're  
15 all wrong. I'm not going to tell Mr. Pomerantz that he's all  
16 wrong. Although I am, I guess, a Dondero tentacle, I am not a  
17 Mr. Draper tentacle, and I happen to disagree with him.  
18 That's my right. I respect the man very much. I thought he  
19 did a very honorable and ethical job explaining his position  
20 to Your Honor. I believe that the Fifth Circuit would approve  
21 exculpations for postpetition pre-confirmation matters taken  
22 by estate fiduciaries. I do believe that they would. And I  
23 do believe that that should be the case.

24 But again, I'm telling you that this one is different.  
25 It's -- Mr. Pomerantz is misdirecting you. The estate

1 professionals manage the estate. The Debtor manages its  
2 business. It goes out into the world and it manages business.  
3 And as Your Honor knows, under that 1969 Supreme Court case,  
4 of course I blanked, and under 28 U.S. 959, a debtor must  
5 comply, when it's out there, with all applicable law.

6 So if the Debtor -- and I'm making this up, okay? I am  
7 making this up. I'm not alleging anything. But if the  
8 Debtor, through actionable neglect, lost \$500 million of its  
9 clients' or its investor clients' money, I'm telling you that  
10 under no theory can that be exculpated, and I'm telling you  
11 that that's what this provision does.

12 The estate and the Debtor can release their claims. It  
13 happens all the time. Whatever -- whatever claims the estate  
14 may have against professionals, those can be released. It's a  
15 9019. I'm not complaining about that. Although I do think  
16 that it's premature in this case, because we don't know  
17 whether there's any liability for the \$100 million that Mr.  
18 Seery told you Mr. Dondero lost. But in no event can business  
19 -- business --

20 THE COURT: I don't understand what you just said.

21 MR. RUKAVINA: Your Honor, I --

22 THE COURT: Mr. Dondero is not released --

23 MR. RUKAVINA: -- went through Mr. Seery's --

24 THE COURT: -- by the estate.

25 MR. RUKAVINA: I understand. I understand. But we

1 all have to also understand that a board of directors and  
2 officers can be liable, breaches of fiduciary duty by not  
3 properly managing an employee. So I'm not suggesting -- I  
4 mean, I know that there's been an examiner motion filed. I'm  
5 not suggesting that we have a mini-trial. I'm not suggesting  
6 there's actionable conduct. What I'm telling you is that the  
7 evidence shows that there's a large postpetition loss. And  
8 it's premature to prevent third parties that might have claims  
9 from bringing those.

10       And then I think -- I'm not sure that Your Honor  
11 understood my point. Let me try to make it again. This  
12 exculpation is not limited in time. This exculpation is  
13 expressly not limited in time and applies to the  
14 administration of the plan post-confirmation. I don't think  
15 under any theory would the Fifth Circuit or any court at the  
16 appellate level allow an exculpation for purely post-  
17 reorganization post-bankruptcy matters. I have nothing more  
18 to tell Your Honor on exculpation.

19           THE COURT: Well, again, I -- perhaps I go down some  
20 roads I really don't need to go down here, but I'm not sure I  
21 read it the way you did. I thought we were just talking about  
22 pre -- postpetition, pre-confirmation. Or pre-effective date.

23           MR. RUKAVINA: Your Honor, Page --

24           THE COURT: The --

25           MR. RUKAVINA: Page 48 of the plan, Section C,

1 Exculpation. Romanette (iv). The implementation of the plan.  
2 And I -- and that's -- that's part of why I asked Mr. Seery  
3 that yesterday. Does the implementation of the plan, in his  
4 understanding, include the Reorganized Debtor's management and  
5 wind-down of the Funds, and he said yes.

6 THE COURT: Okay.

7 MR. RUKAVINA: So that's right there in black and  
8 white.

9 It also includes the administration of the Chapter 11  
10 case. If that is defined broadly, as Mr. Seery wants it to  
11 be, to define business decisions, then that also exceeds any  
12 permissible exculpation.

13 So, again, I'm telling Your Honor, with due respect to you  
14 and to Mr. Pomerantz, that the focus of Your Honor's  
15 questioning is wrong. The focus of Your Honor's questioning  
16 should be on exculpation from what? From business -- i.e., GM  
17 manufacturing and selling the car -- or from management of the  
18 bankruptcy case? Management of the bankruptcy case? Okay.  
19 Postpetition pre-confirmation managing business, never okay.

20 Your Honor, on the channeling -- and let me add, I think  
21 it's very clear, there is no Barton Doctrine here. This is  
22 not a Chapter 11 trustee. The Barton Doctrine does not  
23 extend to debtors-in-possession. And I can cite you to a  
24 recent case, *In re Zaman*, 2020 Bankr. LEXIS 2361, that  
25 confirms that the Barton Doctrine does not apply to a debtor-

1 in-possession.

2 I want to --

3 THE COURT: Remind me of that --

4 MR. RUKAVINA: -- discuss, Your Honor, the --

5 THE COURT: Remind me of the facts of that case. I  
6 feel like I read it, but -- or saw it in the advance sheets,  
7 maybe.

8 MR. RUKAVINA: I honestly do not recall. I read it a  
9 few days ago, and since then, I hope Your Honor can  
10 appreciate, I've been up very late trying to negotiate  
11 something good in this case.

12 THE COURT: I'd like to know --

13 MR. RUKAVINA: So, I mean, I have the case in front  
14 of me.

15 THE COURT: I'd like to know about a holding that  
16 says Barton Doctrine can't be applied in a Chapter 11 post-  
17 confirmation context, if that's --

18 MR. RUKAVINA: Well, I have it --

19 THE COURT: -- indeed the holding.

20 MR. RUKAVINA: I have it right in front of me here,  
21 Your Honor, and I can certainly -- all I know is that this  
22 case held that -- it rejected the notion that the Barton  
23 Doctrine applies to a debtor-in-possession.

24 THE COURT: Okay.

25 MR. RUKAVINA: And maybe --

1 THE COURT: That --

2 MR. RUKAVINA: There it is, right there.

3 THE COURT: What judge?

4 MR. RUKAVINA: Your Honor, it is the Southern  
5 District of Florida, and it is the Honorable -- Your Honor, it  
6 is the Honorable Mindy Mora.

7 THE COURT: Okay.

8 MR. RUKAVINA: M-O-R-A.

9 THE COURT: Okay.

10 MR. RUKAVINA: I have not had the pleasure of being  
11 in front of that judge.

12 Your Honor, let me discuss the channeling injunction.  
13 This is the big one for me. This is the big one. And I think  
14 we have to begin -- and it's the big one, as I'll get to,  
15 because Your Honor knows that the CLO management agreements  
16 give my clients certain rights, and this injunction would  
17 prevent those rights from being exercised post-confirmation.  
18 It's not dissimilar from the PI hearing that we're in the  
19 middle of in an adversary.

20 But I begin my analysis, again, with 28 U.S.C. 959. Your  
21 Honor, that -- the first sentence of that statute makes it  
22 very clear that when it comes to carrying on a business, a  
23 debtor-in-possession may be sued without leave of the court  
24 appointing them.

25 So the first thing that this channel -- gatekeeper,

1 channeling, I don't mean to miscall it -- the first thing that  
2 this gatekeeping injunction does is it stands directly  
3 opposite to 28 U.S.C. 959.

4 28 U.S.C. 959 also says that jury rights must be  
5 preserved. As I'll argue in a moment, this injunction also  
6 affects those rights.

7 In addition to 959, we have the fundamental issue of post-  
8 confirmation jurisdiction. As Mr. Draper said, here, this  
9 channeling injunction applies to post-confirmation matters.  
10 Similar to my answer to you on exculpation, I can see there  
11 being a place for a channeling injunction during the pendency  
12 of a case or for claims that might have arisen during the  
13 pendency of a case. I cannot see that, and I don't know of  
14 any court that, at least at a circuit level, that would agree  
15 that this can apply post-confirmation.

16 It is, again, the equivalent of GM manufacturing a car  
17 post-confirmation and having to go to bankruptcy court because  
18 someone's wanting to sue it for product negligence or  
19 liability. It's unthinkable. The reason why a debtor exits  
20 bankruptcy is to go back out into the community. It's no  
21 longer under the protection of the bankruptcy court. That's  
22 what the media calls Chapter 11, it calls it the protection of  
23 the court. There's no such protection post-reorganization.  
24 So, --

25 THE COURT: Is that really analogous, Mr. Rukavina?

1 Let's get real. Is this really analogous --

2 MR. RUKAVINA: It is.

3 THE COURT: -- to GM --

4 MR. RUKAVINA: It is.

5 THE COURT: -- manufacturing thousands of cars?

6 MR. RUKAVINA: It absolutely is analogous. Because  
7 this Debtor is going to assume these contracts and it is going  
8 to go out there and it is going to make daily decisions  
9 affecting a billion dollars of other people's money. Each of  
10 those decisions hopefully will be done correctly and make  
11 everyone a lot of money, but each of those decisions is the  
12 potential for claims and causes of action.

13 So it is analogous, Your Honor. They want my clients and  
14 others to come to you for purely post-confirmation matters.  
15 The Court will not have that jurisdiction. There will be no  
16 bankruptcy estate, nor can the Court's limited jurisdiction to  
17 ensure the implementation of the plan go to and affect a post-  
18 confirmation business decision.

19 That's the distinction. The Debtor's post-confirmation  
20 business is not the implementation of a plan. As Mr. Draper  
21 said, there's a new entity. There's a new general partner.  
22 There's a new structure. Go out there and do business,  
23 Debtor. That's what they're telling you. They're telling you  
24 this is not a liquidation because they're going to be in  
25 business. Okay. Well, the consequence of that is that

1 there's no post-confirmation jurisdiction.

2 Now, Mr. Pomerantz says, and I think you asked Mr. Draper,  
3 well, the jurisdiction to adjudicate whether something is  
4 colorable is different from the jurisdiction to adjudicate the  
5 underlying matter. Your Honor, I don't understand that  
6 argument, and I don't see a distinction. If the Court has no  
7 jurisdiction to decide the underlying matter, then how can the  
8 Court have any jurisdiction to pass on any aspect of that  
9 underlying matter?

10 And whether something is colorable is a fundamental issue  
11 in every matter. That's the thing that courts look at in a  
12 12(b) (6), in a Rule 11 issue, in a 1927 issue. So they're  
13 going to come -- or someone is going to have to come to Your  
14 Honor and present evidence and law that something is  
15 colorable. Let's say that we've said there's a breach of  
16 contract. Aren't we going to have to show you, here's the  
17 contract, here's the language, here's the facts giving rise to  
18 the breach, here's the elements? And Your Honor is going to  
19 have to pass on that. And if Your Honor decides that  
20 something is not colorable, then there ain't no step two.

21 And if Your Honor decides that something is colorable,  
22 then isn't that going to be binding on the future proceeding?  
23 And if it's going to be binding on the future proceeding, then  
24 of course you're exercising jurisdiction to adjudicate an  
25 aspect of that lawsuit.

1       I don't think that that -- I don't know I can be clearer  
2 than that, Your Honor, unless the Debtor has some other  
3 understanding of what a colorable claim or cause of action is  
4 that I'm misunderstanding.

5       And Your Honor, I would ask, when Your Honor is in  
6 chambers, to look at one of these CLO management agreements.  
7 I'm sure Your Honor has already. I just pulled one out of the  
8 Debtor's exhibits, Exhibit J as in Jason. And Section 14, 14  
9 talks about termination for cause. Most of these contracts  
10 are for cause. So, Your Honor, cause includes willfully  
11 breaching the agreement or violating the law, cause includes  
12 fraud, cause includes a criminal matter, such as indictment.

13       So let's imagine, Your Honor, that I come to you a year  
14 from now and I say, I would like to terminate this agreement  
15 because I don't want the Debtor managing my \$140 million  
16 because of one of these causes. What am I going to argue to  
17 Your Honor? I'm going to argue to Your Honor that those  
18 causes exist. And Your Honor is going to have to pass on  
19 that.

20       And if Your Honor says they don't exist, again, I'm done.  
21 I just got an effective final ruling from a federal judge that  
22 my claim is without merit. I'm done. Your Honor has decided  
23 the matter effectively, legally, and finally.

24       That's why, when Mr. Pomerantz says that the jurisdiction  
25 to adjudicate the colorableness of a claim is different from

1 adjudicating that claim, it's not correct. They're part of  
2 the same thing, Your Honor.

3 We strenuously object to that injunction, we think it's  
4 unprecedented, and we strenuously object to that injunction  
5 because we are not Mr. Dondero.

6 I understand the January 9th order. I'll let Mr.  
7 Dondero's counsel talk about why that was never intended to be  
8 a perpetual order. I'll let Mr. Dondero's counsel argue as to  
9 why the extension of that order *ad infinitum* in the plan is  
10 illegal.

11 But even if Mr. Dondero is enjoined in perpetuity from  
12 causing the related parties to terminate these agreements,  
13 Your Honor, the related parties themselves are not subject to  
14 that injunction. That's why you have the preliminary  
15 injunction proceeding impending in front of you on ridiculous  
16 allegations of tortious interference.

17 So whether the Court enjoins Mr. Dondero or not in  
18 perpetuity is a separate matter. The question is, as you've  
19 heard, at least my retail clients, they have boards. Those  
20 boards are the final decision-makers. Mr. Dondero is not on  
21 those boards.

22 In other words, it is wrong to conclude *a priori* that  
23 anything that my clients do has to be at the direction of Mr.  
24 Dondero. There is no evidence of that. The evidence is to  
25 the contrary.

1       Yes, a couple of my clients, the Advisors are controlled  
2 by Mr. Dondero. Mr. Norris testified to that. You'll not  
3 find Mr. Norris anywhere testifying in that transcript that  
4 Your Honor allowed into evidence that the funds, my retail  
5 fund clients are controlled by Mr. Dondero. You won't find  
6 that evidence. There was no evidence yesterday or today that  
7 Mr. Dondero controls those retail funds. The only evidence is  
8 that they have independent boards.

9       So I ask the Court to see that it's a little bit of a  
10 sleight of hand by the Debtor. If I am to be enjoined or if I  
11 am to have to come to Your Honor in the future as a vexatious  
12 litigant or a tentacle or a frivolous litigant, whatever else  
13 I've been called today, then let it be because of something  
14 that I've done or failed to do, something that my client has  
15 done to warrant such a serious remedy, not something that Mr.  
16 Dondero is alleged to have done.

17       And what have my clients done, Your Honor? What have we  
18 done to be called vexatious litigants and serial litigants?  
19 We've done nothing in this case, pretty much, until December  
20 16th, when we filed a motion that was a poor motion,  
21 unfortunately, the Court found it to be frivolous, and the  
22 Court read us the riot act.

23       We refused, on December 22nd, we, my clients' employees,  
24 to execute two trades that Mr. Dondero wanted us to execute.  
25 We had no obligation to execute them. We knew nothing about

1 them. And Mr. Seery -- I'm sorry. Not Mr. Dondero, that Mr.  
2 Seery wanted to execute. And Mr. Seery closed those  
3 transactions that same day. And then a professional lawyer at  
4 K&L Gates, a seasoned bankruptcy lawyer, sent three letters to  
5 a seasoned professional lawyer at Pachulski, and the letters  
6 were basically ignored.

7       Okay. Those are the things that we've done. Other than  
8 that, we've defended ourselves against a TRO, we've defended  
9 ourselves against a preliminary injunction, we will continue  
10 to defend ourselves against a preliminary injunction, and we  
11 defend ourselves against this plan because it takes away our  
12 rights. Is that vexatious litigation? Is that, other than  
13 the frivolous motion, is that frivolous litigation?

14       And we heard you loud and clear when you read us the riot  
15 act on December 16th. And I will challenge any of these  
16 colleagues here today to point me to something that we have  
17 filed since then that is in any way, shape, or form arguably  
18 meritless.

19       So where is the evidence that my retail funds are  
20 tentacles or vexatious litigants or anything else? There is  
21 no evidence, Your Honor, and the Debtor is doing its best to  
22 give you smoke and mirrors to just make that mental jump from  
23 Mr. Dondero to my clients, effectively an alter ego, without a  
24 trial on alter ego.

25       Once these contracts are assumed, the Debtor must live

1 with their consequences. It's as simple as that. Your Honor  
2 has so held. Your Honor has so held forcefully in the *Texas*  
3 *Ballpark* case. And the Court, I submit respectfully, cannot  
4 excise by an injunction a provision of a contract.

5 Also, this injunction will -- is a permanent injunction.  
6 We know from *Zale* and other cases the Fifth Circuit does  
7 permit certain limited plan injunctions that are temporary in  
8 hundred-cent plans. This is a permanent one. It doesn't even  
9 pretend to be a temporary one.

10 It's also a permanent one because the Debtor knows and I  
11 think the Debtor is banking on me being unable to get relief  
12 in the Fifth Circuit before Mr. Seery is finished liquidating  
13 these CLOs.

14 So what we are talking about today is effectively excising  
15 valuable and important negotiated provisions of these  
16 contracts, provisions that, although my clients are not  
17 counterparties to these contracts, you've heard from at least  
18 three of them we do control the requisite vote, the voting  
19 percentages, to cause a termination, to remove the Debtor, or  
20 to seek to enforce the Debtor's obligations under those  
21 contracts.

22 And again, Your Honor, it's very simple. Where those  
23 contracts require cause, there either is cause or is not  
24 cause. If there is not cause, the Debtor has its remedies.  
25 If there is cause, I'll have my remedies. But it's not for

1 this Court post-confirmation to be making that determination.

2 That's not my decision. That's Congress's decision.

3 So, Your Honor, for those reasons, we object, and we  
4 continue to object, and we'd ask that the Court not confirm  
5 this plan because it is patently unconfirmable. Or if the  
6 Court does confirm the plan, that it excise those provisions  
7 of the releases, exculpations, and injunction that I just  
8 mentioned as being not in line with the Fifth Circuit or  
9 Supreme Court precedent.

10 Thank you.

11 THE COURT: All right. Can I -- I meant to ask Mr.  
12 Draper this. Can we all agree that we do not have third-party  
13 releases *per se* in this plan? Can we all agree on that?

14 MR. DRAPER: I don't know. I have to look at that.  
15 I think what you have are exculpations and channeling  
16 injunctions for third parties who have not paid for those  
17 channeling injunctions or those exculpations.

18 THE COURT: All right.

19 MR. RUKAVINA: Your Honor, was that question -- was  
20 that question solely to Mr. Draper?

21 THE COURT: Well, no, it was to all of you. I  
22 thought we could all agree that we don't have third party  
23 releases *per se*. Okay. There was --

24 MR. RUKAVINA: Your Honor, we --

25 THE COURT: -- a little bit of glossing over that in

1 some of the briefing, I can't remember whose. But we have  
2 Debtor releases, we have --

3 MR. RUKAVINA: Yes.

4 THE COURT: -- exculpations that deal with  
5 postpetition negligence only, we have injunctions, which I  
6 guess the Debtor would say merely serve to implement the plan  
7 provisions and are commonplace, but Mr. Draper would say maybe  
8 are tantamount to third-party releases. Is that --

9 MR. RUKAVINA: Your Honor, I don't think --

10 THE COURT: -- where we are?

11 MR. RUKAVINA: -- there's any question -- I don't  
12 think there's any question that the exculpation is a third-  
13 party release, and that that's also what Judge Fish held in  
14 the *Dropbox* case. It says that none of the exculpated parties  
15 shall have any liability on any claim. So, --

16 THE COURT: All right.

17 MR. RUKAVINA: -- that necessarily --

18 THE COURT: I get what you're saying, but I just  
19 think, in common bankruptcy lingo, most people regard a third-  
20 party release as when third parties are releasing -- third  
21 parties meaning, for example, creditors, interest holders --  
22 are releasing officers and directors and other third parties  
23 for anything and everything.

24 Exculpation, I get it, it's worded in a passive voice, but  
25 it is third parties releasing third parties, but for a narrow

1       thing, postpetition conduct that is negligent. Okay. So I  
2       think -- while there's technically something like a third-  
3       party release there, it's not in bankruptcy lingo what we call  
4       a third-party release. It's an exculpation means no liability  
5       of the exculpated parties for postpetition conduct that's  
6       negligent. So I -- anyway, I think we all agree that, I mean,  
7       can we all agree there aren't any *per se* third-party releases  
8       as that term is typically used in bankruptcy parlance?

9                   MR. RUKAVINA: I apologize, Your Honor, and I'm not  
10      trying to try your patience, but I cannot agree to that.  
11      Whatever claims my client, a nondebtor, has against Strand, a  
12      nondebtor, are gone. Whether it's a release or exculpations,  
13      they're gone. So I apologize, I cannot agree to that, Your  
14      Honor.

15                  MR. DRAPER: Your Honor, this is Douglas Draper. I  
16      can't agree, either. I think it's definitional. And quite  
17      frankly, I think I'm looking at the functional effect of  
18      what's here, and they appear to be third-party releases.

19                  THE COURT: Okay. All right. Who is making the  
20      argument for Mr. Dondero?

21                  MR. TAYLOR: Your Honor, Clay Taylor appearing on  
22      behalf of Mr. Dondero.

23                  THE COURT: Okay.

24                  CLOSING ARGUMENT ON BEHALF OF JAMES D. DONDERO

25                  MR. TAYLOR: Your Honor, first of all, as this Court

1 is well aware, this Court sits, as a bankruptcy court, as a  
2 court of equity. It has many different tools available to it.  
3 One of those, of course, is denying confirmation of this plan  
4 because of the laws that we have discussed today and that we  
5 believe the evidence has shown, and I won't go into those. Of  
6 course, of course, Your Honor could confirm that plan. Yet  
7 another tool available to this Court is it can take it under  
8 advisement.

9 To the extent that this Court decides to confirm this plan  
10 and decides to confirm it today, it certainly takes a lot of  
11 options off the table for all parties. There are ongoing  
12 discussions, I'm not going to go into any of the particulars  
13 of those discussions, but a ruling on confirmation today would  
14 effectively end that, because, absent, then, an order vacating  
15 confirmation, there's a lot of eggs that can't become  
16 unscrambled after a confirmation order is entered.

17 So we would respectfully ask that, to the extent that the  
18 Court is even considering confirmation, we don't believe it to  
19 be appropriate, but at least take it under advisement for 30  
20 days, or at least, in the very alternative, that it announce  
21 some date which it is going to give a ruling, so that we kind  
22 of know when that is going to come down, to see if any  
23 positive ongoing discussions can result in more of a global  
24 resolution that all parties can agree upon.

25 Addressing more the merits of the case, Your Honor, Mr.

1 Dondero does indeed object to the nondebtor releases, the  
2 exculpations, the injunction. I believe those have been  
3 covered rather extensively in the prior argument, so I wasn't  
4 going to go into those here because they've been addressed.  
5 Of course, I will endeavor to answer any questions that Your  
6 Honor may have on those.

7 I will say I think Your Honor asked for everybody's best  
8 shot as to why this is different for a Committee member versus  
9 the independent trustees here. I will say my best shot is,  
10 first of all, *Pacific Lumber* says what it says. I believe Mr.  
11 Pomerantz has indicated their position that that language is  
12 dicta and therefore not binding upon this Court. I  
13 respectfully disagree with that. But to the extent, more  
14 directly answering Your Honor's question, to me, the  
15 difference is clear. Chapter 7 trustees are a creature of  
16 statute. So are Chapter 11 trustees. And -- as are members  
17 of a Committee that are seated pursuant to the Bankruptcy  
18 Code. Those are all creatures of statute. And the  
19 independent board of trustees, while there are certainly --  
20 there are some analogies that can be made, undoubtedly, but  
21 they are not a creature of statute. There is no provision for  
22 them under the Bankruptcy Code. And therefore I don't believe  
23 that they should and can receive the same protections under  
24 *Pacific Lumber*.

25 And so hopefully that -- that is my best shot at

1 answering, directly answering the question that Your Honor  
2 posed.

3 THE COURT: Okay.

4 MR. DRAPER: Mr. Dondero also has issue with the  
5 overbroad continuing jurisdiction of this Court. I believe  
6 Mr. Rukavina has stated that rather succinctly, too. Merely  
7 ruling upon whatever claim is colorable or not certainly has  
8 definite impacts. If this Court has jurisdiction to do that  
9 when it otherwise wouldn't have jurisdiction, it enacts an  
10 expansion, a potentially impermissible expansion of this  
11 Court's jurisdiction. And for that reason, the plan should --  
12 confirmation should be denied.

13 Getting into the particulars of 1129, Your Honor, there is  
14 problems under 1129(a)(2). Those are the solicitation  
15 problems. Let's just kind of look at what the evidence  
16 showed. On November 28th, there was a disclosure statement,  
17 it was published to all creditors, and it said, under this  
18 plan, you're going to get 87 cents. It wasn't a range. Now,  
19 there was some assumptions that went in there, but they said,  
20 under a liquidation of all these assets, you're going to get  
21 62 cents.

22 The Debtors came back approximately two months later, on  
23 January 28th, and said, oh, wait, we missed the boat here, and  
24 actually, under the plan, you're going to get 61 cents. And  
25 under a liquidation, though, you'd only get 48.

1        Well, the problem is, already, two months later, they've  
2 already told you they missed the boat on what the liquidation  
3 analysis was just two months ago. And two months ago, they  
4 told you under a liquidation you'd get 62 cents, and now we're  
5 telling you you're going to get less. That's at least some  
6 very good evidence that the best interests of the creditors  
7 isn't being met, and potentially a liquidation is much better.

8        They then came back, potentially maybe realizing that  
9 problem, also because some new information came in with the  
10 employees, and also with UBS, which adjusted the overall  
11 general unsecured claims pool, and said, well, under the plan  
12 you're going to get 71 cents, and under a liquidation you're  
13 going to get 55 cents.

14       In between those iterations from November to February,  
15 they found \$67 million more in assets. So Mr. Seery testified  
16 he believed some of that's as to market increases in values,  
17 and some (garbling) investment, market -- securities. And  
18 some were just in these private equity investments.

19       There are indeed some rollups behind all of these numbers.  
20 I do understand why they wouldn't want to make some of these  
21 numbers public, because they might not be able to get --  
22 create the upside for any particular asset class that they're  
23 seeking to monetize.

24       However, we and others, including Mr. Draper, asked for  
25 those rollups to be provided, and we certainly could have

1 taken those under seal or a confidentiality agreement, could  
2 have also put those before this Court under seal and the  
3 Debtor could have put those rollups before this Court under  
4 seal. It elected not to do so.

5 So, rather, what you have is the naked assumptions of this  
6 is what we think we can monetize the assets, or we're not  
7 going to tell you what it is, but trust me, Creditors, and  
8 cool, we found \$67 million worth of value in the past two  
9 months, so therefore we're going to beat the liquidation  
10 analysis that we previously told you just two months ago.

11 They also acknowledge that, in those two months, that  
12 there was going to be about \$26 million in increased costs  
13 from their November analysis to their February analysis. And  
14 they included that in their projections.

15 Finally, they acknowledged, in those two months, that we  
16 had previously estimated -- and they even have it in their  
17 assumptions in November liquidation and plan analysis -- that  
18 UBS, HarbourVest, and I believe it was Acis, were all going to  
19 be valued at zero dollars, and that's what the claims were  
20 going to be. Well, they kind of missed the boat on those, and  
21 they missed it by a lot. They -- it increased all the claims  
22 in the pool from \$195 million to \$273 million, or sorry, I  
23 don't -- look at that again, but it was an increase of \$95  
24 million. I'm sorry, 190 -- the claims pool increased from  
25 \$194 million to -- I'm sorry, Your Honor, I have too many

1 papers in front of me -- on November, the claims pool was 176  
2 and it increased by February 1st to 273. Therefore,  
3 approximately \$95, almost \$100 million worth of claims that  
4 they weren't anticipating that actually came in.

5 That tells you about the quality of the assumptions that  
6 went into the analysis to begin with. They missed it by 50  
7 percent on what the overall claims pool was going to be.  
8 That's significant. It's material.

9 There is a lot of other assumptions that could go into  
10 this document, and one of those assumptions are how much are  
11 we going to be able to monetize these assets for? One other  
12 assumption is, well, how much is it going to cost during the  
13 two-year life of this wind-down? Another assumption is going  
14 to be, are we actually going to be able to wind down in two  
15 years? Because if we're not, well, guess what, all those  
16 costs are going to go up. Another assumption is, well, how  
17 much are those fee claims going to be over the two-year  
18 period? Again, if it goes over two years, they're going to be  
19 significantly higher. Moreover, you might have just missed  
20 what the burn rate is.

21 So I think it's rather telling that the assumptions made  
22 of -- all the way back of over two -- of only two months ago  
23 were off by \$100 million, and therefore it skewed all of the  
24 plan-versus-liquidation analysis all over the board.

25 That's the only evidence that the Debtor has put forth as

1 to why it's in the best interest of the creditors. And quite  
2 frankly, we don't believe they have met their burden. And it  
3 is their burden to prove to Your Honor that the plan is better  
4 than what a Chapter 7 trustee will -- can do.

5 What the evidence does show, as far as what the plan would  
6 do as compared to a hypothetical Chapter 7 trustee, is that we  
7 know for sure that the Claimant Trust base fee, just over the  
8 two years, is going to be \$3.6 million.

9 (Interruption.)

10 MR. TAYLOR: I'm sorry.

11 THE COURT: Someone needs to put their device on  
12 mute. I don't know who that was.

13 MR. TAYLOR: Oh, I'm sorry. I thought you said  
14 something, Your Honor.

15 THE COURT: No.

16 MR. TAYLOR: So what we do know is the Claimant  
17 Trustee base fee is going to be \$3.6 million. What we don't  
18 know and what was not put into evidence because they are still  
19 negotiating it is there's going to be a bonus fee on top of  
20 that that's going to be paid to Mr. Seery. Is that \$2  
21 million? Is that \$4 million? Is that \$10 million? Well, we  
22 don't know. We can't perform that analysis as compared to  
23 what a hypothetical Chapter 7 trustee could be. Nor can Your  
24 Honor, based upon the evidence presented.

25 And quite frankly, I don't see how one could ever conclude

1 -- and there are some other unknowns that we're about to go  
2 over, including the Litigation Trust base fee and there are  
3 collection fees, contingency fees. Those are also to be  
4 negotiated. To be negotiated and unknown. You can't perform  
5 the analysis. The Debtor couldn't perform the analysis  
6 because those are to be negotiated, so you can't tell whether  
7 a Chapter -- hypothetical Chapter 7 trustee might come out  
8 better because he's not going to incur all these costs. We  
9 know that they're going to incur D&O costs.

10 THE COURT: Let me interject right now.

11 MR. TAYLOR: Sure.

12 THE COURT: Again, I'm going to go back to  
13 understanding who your client is arguing for. Okay? Again,  
14 as we've said before, Mr. Pomerantz did not technically say no  
15 standing, but he thought it was important to point out the  
16 economic interests that our Objectors either have or don't  
17 have. Okay?

18 So I'm looking through my notes to see exactly what the  
19 Dondero economic interest is. I have something written in my  
20 notes, but I'm going to let you tell me. Tell me what his  
21 economic interests are with regard to this Debtor, this  
22 reorganization.

23 MR. TAYLOR: Your Honor, I believe he has been placed  
24 into Class 9, Subordinated Claims. So to the extent that  
25 there is recovery available to Class 9, he can recover on

1 those claims.

2 THE COURT: But what proof of claim --

3 MR. TAYLOR: We also have --

4 THE COURT: What proof of claim does he have pending  
5 at this juncture?

6 MR. TAYLOR: Your Honor, I would have to go back and  
7 look. I don't have the proofs of claim register in front of  
8 me. And I'm sorry, if I tried to speculate, I would be doing  
9 a disservice to my client and this Court by trying to  
10 speculate. I did not prepare those proofs of claim. People  
11 in my firm did. But I would be merely speculating if I tried  
12 to give you an answer off the spot. And I apologize. I'm  
13 happy to submit a post-confirmation hearing letter --

14 THE COURT: No, no, no.

15 MR. TAYLOR: -- as to that.

16 THE COURT: I'm not going to allow one more piece of  
17 paper in connection with confirmation. I thought you would be  
18 able to answer that.

19 MR. TAYLOR: I'm sorry. I just don't want to lie to  
20 Your Honor.

21 THE COURT: What about his -- what would be an  
22 indirect equity interest?

23 MR. TAYLOR: Well, again, there are a lot of people  
24 that know this org chart a lot better than me. This is me  
25 going on hearsay myself. But I understand he also owns a lot

1 of indirect interests in subsidiaries, some of which are  
2 majority, some of which are minority, and some of which he  
3 owns maybe directly, some of which through other entities. So  
4 the way in which these assets could be monetized at the sub-  
5 debtor level could certainly impact his economic rights and  
6 could impact him greatly. For instance, if the --

7 THE COURT: I really wanted an exact answer.

8 MR. TAYLOR: Mr. Seery --

9 THE COURT: I really wanted an exact answer, not just  
10 he has an indirect interest in, you know, some of the 2,000 --  
11 I'm not going to say tentacles, but --

12 I'm going to interrupt briefly, because I really want to  
13 nail down the answer as best I can. Mr. Pomerantz, can you  
14 just remind me of what your answer was or statement was  
15 regarding Mr. Dondero, individually, his economic stake in all  
16 this?

17 MR. POMERANTZ: He has an indemnification claim  
18 that's been objected to, --

19 THE COURT: That's the one and only --

20 MR. POMERANTZ: -- although it's not before --

21 THE COURT: That's the one and only pending proof of  
22 claim, right?

23 MR. POMERANTZ: That's my understanding. And while  
24 it's not before the Court, we could all imagine whether Mr.  
25 Dondero's going to be entitled to indemnification.

1           He has an interest in Strand, which is the general  
2 partner.

3           THE COURT: Right.

4           MR. POMERANTZ: And Strand owns a quarter-percent --  
5 a quarter of one percent of the equity. I believe that is all  
6 of Mr. Dondero's economic interest in the Debtor.

7           THE COURT: Okay. So, again, I'm just trying to, you  
8 know, understand who he's looking out for, for lack of a  
9 better way of saying it, Mr. Taylor, in making these  
10 arguments.

11          MR. TAYLOR: So, there is also, and this is -- I'm  
12 not involved in what are these going to be filed collection  
13 suits, or some of which have been filed, some of which have  
14 not been filed, none of which I believe the answer date has  
15 been -- has passed or come to be yet.

16          But he is also a defendant in collection suits on these  
17 notes, as you are undoubtedly aware.

18          THE COURT: Okay. He's a defendant in adversary  
19 proceedings. Okay? That makes him a party in interest to --  
20 well, I keep -- that makes him have standing to make an  
21 1129(a)(7) argument? That's why I'm going down this trail.  
22 Because you've spent the last five minutes talking about, you  
23 know, creditors could do better in a Chapter 7 liquidation.  
24 I'm not sure he has standing to make that argument, so I'm  
25 wanting you to address that squarely.

1                   MR. TAYLOR: Your Honor, I believe he has economic  
2 interests up and down the capital structure. And I cannot  
3 describe to you, without wildly speculating and potentially  
4 lying to this Court, which I'm not going to do, without some  
5 time to have looked at that, because I was -- I was not  
6 involved in the proofs of claim and I am not his accountant.  
7 So I could not do that without wildly speculating, so I just  
8 -- I would like to more directly answer your question, Your  
9 Honor. I am not trying to avoid the question. But I can't  
10 honestly answer your question with true facts as we sit here  
11 right now.

12                  THE COURT: All right. But do you agree or disagree  
13 with me that only parties -- the only parties that really can  
14 make an 1129(a)(7) argument are holders of claims or interests  
15 in impaired classes?

16                  MR. TAYLOR: Your Honor, I believe that Mr. Dondero  
17 has standing to do so by virtue of claims for indemnification  
18 --

19                  THE COURT: Okay.

20                  MR. TAYLOR: -- if these -- if these -- if this  
21 Debtor (indecipherable) able to meet its obligations to  
22 indemnify him. And some of those are significant claims that  
23 are being brought against him that could total millions, if  
24 not tens of millions of dollars, just in defense costs alone,  
25 that I do believe give some standing.

1           THE COURT: Okay. So, assuming you're right, you  
2 think the evidence does not show this is better than a Chapter  
3 7 liquidation where we would have a stranger trustee come in  
4 and just, yeah, I guess, cold-turkey liquidate it all.

5           MR. TAYLOR: Your Honor, I do believe that the  
6 evidence shows that the Debtor hasn't met its burden as to  
7 this. A Chapter 7 trustee doesn't necessarily have to  
8 liquidate immediately. It can run these -- these assets. I  
9 mean, Mr. Seery is going to do it with ten people. At one  
10 time, just two months ago, he said he was going to do it with  
11 three people. A Chapter 7 trustee could certainly have a  
12 limited runway, or even an extended runway, if it so asked for  
13 it, to liuate these Debtors.

14          Moreover, there would be at least the requirements that  
15 the Chapter 7 trustee would request the sale, tell creditors  
16 about it. And, as many courts have said, the competitive  
17 bidding process is the best way to make sure that you ensure  
18 the highest and best offer that you can get.

19          Mr. Seery has not committed to providing notice of sales  
20 to creditors and other parties in interest, potentially  
21 bringing them in as bidders. They -- he could name a stalking  
22 horse, but he has not indicated any desire to do so. A  
23 Chapter 7 trustee would endeavor to do so.

24          So I do believe that there are some advantages. And  
25 you've heard no testimony that they've performed any analysis

1 or conducted any interviews with any Chapter 7 trustees as to  
2 whether or not this was possible or not. They just made the  
3 naked assumption that they would do work based upon what they  
4 said was their experience. And Mr. Seery's deposition, when  
5 it was taken and noticed as a 30(b)(6) deposition, and I  
6 believe it has been entered into evidence here, he said the  
7 last time he dealt with a Chapter 7 trustee was 11 or 13 years  
8 ago, and it was the *Lehman* case, and that was the -- a SIPC  
9 trustee. So --

10 THE COURT: Well, --

11 MR. TAYLOR: -- that's the last time he had any  
12 experience with it.

13 THE COURT: -- again, I don't mean to belabor this  
14 point, just like I didn't mean to belabor a few others. But,  
15 you know, there is a mechanism, yes, in Chapter 7, Section  
16 704, for a trustee to seek court authority to operate a  
17 business. But it's not a statute that contemplates long-term  
18 operation. Okay? It's just, oh, we've got a little bit of --  
19 you know, we have some assets here that really require a  
20 short-term operation here.

21 If it's long-term, then you convert to Chapter 11. Okay?  
22 It's just a temporary tool, Section 704. Right? Would you  
23 agree with me?

24 MR. TAYLOR: That's typically how it has been used.

25 THE COURT: Okay.

1                   MR. TAYLOR: But that's not to say that it's limited  
2 in time by the statute itself. It doesn't say that it can't  
3 go for one year or two years. That can be a short wind-down  
4 period.

5                   THE COURT: But hasn't your client's argument been  
6 this past several weeks that Mr. Seery is moving too fast,  
7 he's wanting to sell things and he needs to hold them longer?  
8 I mean, these two argument seem inconsistent to me.

9                   MR. TAYLOR: So, just because a Chapter 7 trustee has  
10 been appointed doesn't mean that he has to sell them any  
11 faster than Mr. Seery.

12                  I think what the -- the problem with the process that has  
13 been going on with Mr. Seery, my client's problem with it, is  
14 not necessarily the timing but the process that Mr. Seery is  
15 going through with these sales. Provide notice, allow more  
16 bidders to come in, make sure that he's getting the highest  
17 and best price. And if that happens to be Mr. Dondero who  
18 offers the highest and best price, great. And if Mr. Dondero  
19 gets outbid by somebody, well, that's all the more better for  
20 the estate.

21                  THE COURT: Okay. Continue your argument.

22                  MR. TAYLOR: I believe we covered a lot of it, Your  
23 Honor, and the plan analysis is all based upon their  
24 assumptions that there's \$257 million worth of value. Again,  
25 there's no rollup provided as to how that asset allocation is

1 broken out, but they consist of a couple of items.

2 First, there's the notes; and second, there's the assets.  
3 The notes are either long-term or demand notes. Those long-  
4 term notes, Mr. Seery will tell you some have been validly  
5 accelerated and therefore are now due and payable. I think  
6 there's arguments to the contrary. But those long-term notes  
7 probably have some both time value of money and collection  
8 costs. And then, of course, you have to discount them by  
9 collectability issues, too.

10 I don't believe any analysis went into it, or at least the  
11 Court was not provided any data or analysis as to what  
12 discounts were applied to those notes. And, therefore, I  
13 don't think that this Court can make any determination that  
14 the best interests of the creditors have been met.

15 As far as the assets that are to be monetized, again,  
16 there's two sub-buckets of those assets. There's securities  
17 that are to be sold. Some of those are semi-public securities  
18 that have markets. Those are somewhat more readily  
19 ascertained. The others are holdings in private equity  
20 companies, and sometimes holdings in companies that own other  
21 companies.

22 There's no evidence of the value -- empirical evidence of  
23 the value of those companies, nor of the assumptions that went  
24 into as to when they should be sold, how much they'd be sold  
25 for.

1       Again, I do realize the sensitive nature of such  
2 information, but that could have been placed under seal. And  
3 without that information, I don't believe that the Court can  
4 conduct the due diligence it's necessary to say the best  
5 interest of the creditors have been met.

6       To sum up, Your Honor -- oh, I'm sorry. One other point  
7 that I did want to talk about before I summed up is, you know,  
8 Mr. Pomerantz and I were listening to a different record or I  
9 was totally confused as to the testimony that was put forth  
10 regarding the directors and officers. I believe the testimony  
11 in the record is extremely clear that the Debtor made no  
12 effort to go out and find out if it could obtain directors and  
13 officers insurance without a gatekeeping injunction or a  
14 channeling injunction, whatever you want to call it. I  
15 believe that his testimony was extremely clear. He didn't  
16 shop it. He doesn't know. And that's what the record is  
17 before this Court.

18       To the extent that the Debtor wants to rely upon we can't  
19 get Debtor -- or, directors and officers insurance because  
20 without this gatekeeping function we just can't get it, I  
21 believe the record just wholly does not support that. The  
22 testimony was at least extremely clear, as how I heard it.  
23 Your Honor will have to review the record herself, but I don't  
24 believe that there was much argument about it.

25       I'm sure -- as I stated in the beginning, Your Honor, this

1 is a court of equity. It could deny confirmation, as I  
2 believe Your Honor should, based upon the flaws in the plan.

3       If Your Honor finds that the plan as written is  
4 impermissible because of any of the exculpation or the  
5 gatekeeping functions that they're asking, the testimony is  
6 equally clear that the independent directors would not serve  
7 in -- as officers of the Reorganized Debtor. Any plan that is  
8 put forth by the Debtor has to tell the people who are going  
9 to be officers going forward. And with that naked testimony  
10 before the Court, that it's simply not feasible, and I don't  
11 think it is one of the possible -- where the Court can come  
12 back and say, well, I can't confirm this plan as written, but  
13 if you change it and rewrite it to get rid of the certain  
14 offensive parts of the exculpation or the gatekeeping  
15 functions, then we can confirm this plan. And I think the  
16 evidence before this Court is it's not feasible because none  
17 of the directors will serve in that capacity, and therefore  
18 this plan should be dead on arrival if Your Honor agrees the  
19 proposed provisions do not meet *Pacific Lumber*.

20       We would ask the Court to deny confirmation, but in the  
21 alternative, to at least take this under advisement. Give us  
22 a time frame -- we'd ask for 30 days -- but give us a time  
23 frame of when the Court is going to rule, to allow the  
24 positive conversations to move forward.

25       To that end, Your Honor, there is, indeed, a hearing on

1 the extension of a temporary injunction and contempt that is  
2 scheduled for Friday. I understand that the parties, at least  
3 the joint parties, will not -- will agree to, I'm sorry, will  
4 agree to the extension of the temporary injunction until such  
5 time as the Court can rule on confirmation. I do see that  
6 there could be a lot of harm done at the Friday hearing. We  
7 would ask that the Court additionally continue that hearing on  
8 that motion and on the injunction, and contempt, until such  
9 time as confirmation has been ruled upon. It will be both  
10 efficient and allow discussions to continue regarding  
11 potential global resolution.

12 And so that is the end of my argument, Your Honor.

13 THE COURT: All right. Thank you. All right. Mr.  
14 Pomerantz, do you have any rebuttal?

15 REBUTTAL CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

16 MR. POMERANTZ: Yes, I do, Your Honor. I want to  
17 address a couple of comments that Mr. Taylor made towards the  
18 end. First of all -- and, actually, the beginning.

19 We think Your Honor should rule on confirmation. Ruling  
20 on confirmation and having an entered confirmation order are  
21 two separate things. We understand that a new offer was made.  
22 Whether that's acceptable to the Committee -- I actually think  
23 it will enhance the ability of the parties to see if they  
24 could reach a deal if there's (audio gap) that Your Honor is  
25 going to confirm the plan.

1       Again, doesn't mean a confirmation order has to be  
2 entered, but I think, based upon my personal experience in  
3 negotiating with Mr. Dondero, that your clear communication to  
4 the parties that, unless something happens, you will enter a  
5 confirmation order, I think will change things. Okay?  
6 Without getting into settlement discussions, things have  
7 changed over the last several days, and we wish you would have  
8 -- wish things would have happened sooner. But we totally  
9 disagree that Your Honor should hold your ruling for 30 days  
10 or any other period of time.

11       Part of the reason I think they are making that argument  
12 is because they have an examiner motion and they recognize  
13 that, upon confirmation, the examiner motion is moot. So I  
14 think there's strategic reasons as well.

15       We don't think there should be a continuance of the TRO  
16 hearing and of the contempt hearing. As Your Honor recalls,  
17 the contempt motion was specifically set for this time to give  
18 Mr. Dondero enough time to prepare. Your Honor was sensitive  
19 to his due process concerns. We set the TRO, the preliminary  
20 injunction hearing against the Advisors and the Funds, we set  
21 that, again, knowing that it would be after confirmation.

22       So we do not agree that either should be continued.  
23 Again, we think the more direct, unequivocal answers Your  
24 Honor can give to the parties, the better off we'll be.

25       I guess -- Mr. Taylor and I do agree that the record was

1 clear. I guess we just disagree on the clarity of it. I  
2 heard Mr. Tauber testify that when he went out to people, to  
3 insurance carriers, after he and Aon were engaged, they all  
4 talked about a Dondero exclusion. Okay? They weren't  
5 convinced into a gatekeeper provision because it was provided  
6 as part of the normal materials you would provide in a  
7 bankruptcy court and trying to get D&O liability in the  
8 context of a bankruptcy case. Mr. Tauber's testimony was  
9 pretty clear, that carriers wanted to have a Dondero  
10 exclusion. And, in fact, the only reason we were able to get  
11 any coverage was because of the gatekeeper.

12 So, yes, the record was clear. We just disagree.

13 I'd like to go back to Mr. Draper's comments going -- and  
14 a couple of things, obviously, overlap. I guess one of the  
15 things here, it's great that everyone is coming in here as  
16 different interests and different parties or whatnot. But as  
17 I mentioned, Your Honor, at the outset, and I've repeated a  
18 few times, these are all -- the only people we have not been  
19 able to resolve issues with are the Dondero parties and the  
20 related parties. And I recall the tentacles. Mr. Davor  
21 questioned that. Mr. Clemente, his comments. But the fact of  
22 the matter is, Your Honor, Your Honor has heard testimony.  
23 Your Honor has had hearings. Mr. Rukavina represents the  
24 Advisors and the Funds. Your Honor has never seen the  
25 independent board member testify in this case to demonstrate

1 how these entities are really different. So while Mr.  
2 Rukavina does -- you know, tries his best, and I think he has  
3 limited stuff to work with, but I give him credit for doing  
4 the best he can, these are all Dondero-related entities and  
5 Your Honor has seen that.

6 So, Your Honor, going to the resolicitation argument, it  
7 actually has taken up a lot more time than the argument is  
8 worth, for one very simple reason. As I said in my argument,  
9 and as Mr. Taylor and Mr. Draper totally ignored, there were  
10 17 creditors who voted yes, 17 creditors who were apparently  
11 misled, that Mr. Draper is looking out for the little guy and  
12 Mr. Taylor is fumbling over his reason for why that's  
13 important to Dondero. And of those 17 creditors that voted  
14 yes, Your Honor, they were either the employees related to  
15 HarbourVest, UBS, Redeemer, or Acis, except for two. And you  
16 know the other two? One was Contrarian, a claim buyer, who,  
17 yeah, elected to be in Class 7, and the other was an employee  
18 with a dollar claim.

19 So the whole argument that there should be a  
20 resolicitation is preposterous, Your Honor. But to go to some  
21 of the specifics in what they argued, we didn't require  
22 creditors to monitor recovery. The footnote -- as I  
23 indicated, the UBS 3018 was in the disclosure statement that  
24 went out. It didn't make it to the projections. It was  
25 clearly -- and they characterize it, I think Mr. Draper

1 characterized it as buried in the document. There is a  
2 section that every disclosure statement is required to have  
3 called Risk Factors. This disclosure statement had that. And  
4 in the disclosure statement, it talked about the amount of  
5 claims being a risk factor.

6 Mr. Draper also said that the Debtor totally changed its  
7 business model from the first to the second analysis. That is  
8 incorrect. The Debtor was always going to manage funds. Yes,  
9 did they add the CLOs? But before, they were going to manage  
10 Multi-Strat, they were going to manage Restoration Capital,  
11 they were going to oversee Korea, they were going to be doing  
12 the management of the funds. So there wasn't a big change in  
13 the business model, Your Honor.

14 Mr. Taylor, on the solicitation issue, says we found \$67  
15 million in assets. You know, that's a disingenuous statement.  
16 I think over \$20 million was found because his client and  
17 related entities didn't make a payment on notes and they got  
18 accelerated. So while before we would have had to wait over  
19 time if they were paid, it's not surprising that Mr. Dondero  
20 and his related entities just failed to basically pay the  
21 notes.

22 So that was, I think, over \$20 million. And then there  
23 was the HCLOF asset. That was acquired in the HarbourVest  
24 settlement. And then there was basically an increase in some  
25 value to some assets.

1           So there wasn't anything mysterious here. There wasn't  
2 anything that the Debtor was trying to hide. There weren't  
3 any found assets. It was based upon different circumstances.

4           Mr. Taylor complains about the lack of rollup of assets,  
5 the lack of evidence on the best interests of creditors test.  
6 Your Honor, you've had extensive testimony from Mr. Seery  
7 about what would happen in a Chapter 7 and what would happen  
8 in a Chapter 11. And you know why we didn't provide the  
9 information to Mr. Taylor and his client on what the rollup of  
10 the assets would be, and do you know why he wants them? He  
11 wants to know what the assets are so he can try to bid.

12          And there also was the allegation that the failure to  
13 allow them to bid means we're going to get less in a Chapter  
14 11 than a 7. Two comments to that, Your Honor. Number one,  
15 if that was the case, a debtor would never be able to satisfy  
16 the best interests of creditors test. If the existence of a  
17 public process *de facto* meant you would get more value than  
18 outside, you would never be able to satisfy that. And, quite  
19 honestly, that's just not the law, Your Honor.

20          You have an Oversight Committee with over \$200 million of  
21 creditors who are going to watch Mr. Seery like a hawk, like  
22 they have watched him during the case. And the concern that  
23 somehow, because these assets are not put into full view to  
24 sell, that they will get less value, it's just not -- it's not  
25 supported by the evidence at all, Your Honor. And Mr. Seery

1 will make the determination. If it makes sense to notice up  
2 and provide Mr. Dondero with notice, he will. If he doesn't,  
3 he won't.

4 Your Honor, going -- oh, and then the last comment on the  
5 -- that I'll make on the resolicitation and the liquidation  
6 analysis is Mr. Taylor chides us and we've been criticized for  
7 not disclosing more about the HarbourVest and the UBS  
8 settlements and that we were off substantially. Your Honor,  
9 you've heard testimony that we were in pending litigation with  
10 HarbourVest and UBS at the time. What kind of litigant would  
11 we be if we came in and said, you know, Your Honor, you know,  
12 Creditors, we think the UBS claim is going to be allowed at  
13 \$60 million and we think the HarbourVest claim is going to be  
14 allowed at \$30 million? Would that really have benefited  
15 creditors and this estate, to basically, after we took the  
16 position, hard negotiations and hard pleadings that we  
17 prepared, and in some cases filed, that we didn't have any  
18 liability? It would have made no sense, and it would have  
19 been a dereliction of our duty to actually come out and say  
20 what the claims -- the claims were, or what we thought they  
21 could be settled for.

22 Your Honor, going back to Mr. Draper's comments. He  
23 started with the exculpation. First he made a comment that I  
24 don't think he intended what he said, but he said that the  
25 exculpation order, the January 9th order, cuts off when the

1 independent directors go away. I think what he meant to say  
2 is that since the three people are not going to be independent  
3 directors anymore, that basically any actions going forward by  
4 any of those three are not covered. But let's be clear. The  
5 January 9th order is in effect, and if at some point in the  
6 future somebody has a claim against those three gentleman, or  
7 their agents, for what they did as independent directors or  
8 their agents, that order will apply.

9 Your Honor, we next had a discussion, or Mr. Draper and  
10 you had a discussion on professionals. I'm aware of the Fifth  
11 Circuit law that says res judicata, fee applications. I think  
12 that only applies to claims that the Debtor and estate would  
13 have. It doesn't really apply to an exculpation. But there's  
14 Texas state law that I identified in our brief and we cited to  
15 that limits third parties' ability to go after professionals.

16 But the bottom line is the Fifth Circuit, in *Pacific*  
17 *Lumber*, didn't deal with professionals. Your Honor was  
18 correct in pushing both Mr. Taylor and Mr. Rukavina. What  
19 really that was was a policy case. And professionals have  
20 nothing to do with 524(e). So the *Palco* and the *Pacific*  
21 *Lumber* reference and explanation of 524(e) doesn't have  
22 anything to do with professionals. And we would submit, Your  
23 Honor, that an exculpation, especially in a case like this, is  
24 important for professionals.

25 I understand Your Honor's comments that maybe it's much

1 ado about nothing, but I'm not really sure it's much ado about  
2 nothing when we have Mr. Dondero and his affiliates who,  
3 notwithstanding their efforts to just claim that all they are  
4 doing is trying to get a fair shake, Your Honor knows better.  
5 Your Honor knows better from the years you've been litigating  
6 with them, and we know better and the Debtor knows better from  
7 what the independent directors have been dealing with.

8                 THE COURT: Let me ask you this, though. I came into  
9 the hearing with the impression we were just talking about  
10 postpetition pre-confirmation, or pre-effective date maybe I  
11 should say, was the expanse of time covered by exculpation.  
12 And Mr. Rukavina said no, no, no, go back, look at, I don't  
13 know, Subsection 4 of something. It is a post-confirmation  
14 concept. What is your response to that?

15                 MR. POMERANTZ: I believe it's implementation. And,  
16 again, --

17                 THE COURT: Implementation? Yes.

18                 MR. POMERANTZ: -- I think Mr. Rukavina -- right. I  
19 think Mr. Rukavina and Mr. Taylor and Mr. Draper have done a  
20 great job trying to muddy the issues. They talk about our  
21 sleight of hand and how we're trying to do things that are way  
22 beyond the bankruptcy court's jurisdiction. We are not. I  
23 think they are trying -- what they have done throughout the  
24 case is throw up enough mud. And here's, here's the answer to  
25 that question, Your Honor. Implementation. Okay? We know

1 what implementation means. The plan says implementation is  
2 cancelation of the equity interests, creation of new general  
3 partners, restatement of the limited partners, establishment  
4 of the Claimant Trust and Litigation Sub-Trust. That's the  
5 implementation.

6 We are not trying to get exculpation for post-confirmation  
7 activity. Actually, my partner, Mr. Kharasch, in specifically  
8 addressing Mr. Rukavina's concern, said, look, if you have a  
9 problem with cause, if you have a problem, want to exercise  
10 your rights, we're only asking you to come back to the Court.  
11 We are not stopping you.

12 So the whole argument that the exculpation is really broad  
13 and is not really -- does not really cover just the plan, the  
14 approved plan, I think is a red herring. Implementation is  
15 implementation in the context of the plan.

16 And also Mr. Rukavina tries to argue that, well, it's  
17 administration, it's not really you acting any operation of  
18 business. I just don't think there's any support in the case  
19 law. Your Honor has overseen this case, overseen this  
20 Debtor's activities, overseen the independent directors'  
21 activities, overseen Strand's activities, overseen the  
22 employees' activities. And those activities have been  
23 (indecipherable) administration of the case. And his attempt  
24 to create a different category for, well, it's not  
25 administration, it's operation and so it doesn't apply, I just

1 think is wrong.

2 Your Honor made a couple of comments about what was  
3 *Pacific Lumber* doing. It was a policy decision. If there was  
4 a bright-line rule, then nobody would be entitled to  
5 exculpation. The very fact that the Fifth Circuit said that  
6 Committee members are different made -- makes it clear it was  
7 -- it was policy.

8 And Mr. Taylor's comments that, well, their creation of  
9 statute, Chapter 11 trustees and Committee members, that's not  
10 what basically the case said. If you look at the citation to  
11 touters in the case, it was we want people to volunteer and  
12 who are needed for the process. Committee members are needed  
13 for the process. We don't want to discourage them from coming  
14 in. And the only testimony you have on the independent  
15 directors is from Mr. Dubel, and he testified the importance  
16 of independent directors to modern-day Chapter 11 practice,  
17 the importance of exculpation, indemnification, and D&O  
18 insurance. And his testimony: uncontroverted. The Objectors  
19 could have brought in someone to say something different, but  
20 the only testimony before Your Honor is, if Your Honor does  
21 not approve exculpations in cases like this, you will not get  
22 independent directors and it will have an adverse effect on  
23 the Chapter 11 process.

24 So, while I appreciate all the Objectors trying to say  
25 bright line, trying to say *Pacific Lumber*, that is the gut

1 reaction, right? That's -- it's easy to say. But Your Honor  
2 will know better, from reading the cases, that's not what  
3 *Pacific Lumber* says. And for the several reasons I gave, it's  
4 the reason why *Pacific Lumber* does not govern the decision in  
5 this case.

6 Your Honor, Mr. Draper then started to talk about *Craig*.  
7 And everyone cites *Craig* as this, you know, limiting  
8 jurisdiction. Now, we acknowledge that *Craig* and the Fifth  
9 Circuit has a more limited post-confirmation jurisdiction  
10 approach than the other Circuits, but it's not nonexistent.  
11 And just because the Debtor is going out post-confirmation and  
12 acting does not mean that the conduct that they are engaging  
13 in is not -- and disputes that arise, doesn't come within the  
14 Court's jurisdiction. If that was the case, and I think Your  
15 Honor recognized this, in your case it was the *TXMS* case,  
16 while it's limited, more limited after confirmation, and I  
17 think you even, in the case -- or, in one case of yours, said  
18 that even after the case is closed there could be  
19 jurisdiction. So their just trying to argue *Craig* is just --  
20 is just too much.

21 Going out of the gatekeeper, Mr. Draper tried to say we  
22 are *Barton*, and that's it, and *Barton* has its limitations, et  
23 cetera. First of all, with respect to *Barton*, it is not  
24 limited and doesn't include debtors-in-possession. We have  
25 cited cases in our materials where it has been applied to

1 debtors-in-possession.

2 So, you know, look, maybe this is a provision -- this is a  
3 proposition like many in bankruptcy, you could find a  
4 bankruptcy court to agree with a proposition, but there's  
5 cases all over the place on that. There's cases applying to  
6 post-confirmation. The trend has been to expand *Barton*. But  
7 the beauty of it is, Your Honor, you don't have to rely on  
8 *Barton*. *Barton* was one of our arguments. We gave *Barton* as,  
9 you know, somewhat of an analogy but somehow applying because  
10 in the -- because the independent directors were like the  
11 trustees.

12 But we recognize it may be going farther than *Barton* has  
13 previously gone. But the case law is clear, it is being  
14 extended. But we -- I gave you several provisions of the  
15 Bankruptcy Code that authorized you to enter a gatekeeper  
16 order. None of the Objectors objected on any of those  
17 grounds. They didn't say the statutes that I cited. And it  
18 wasn't only 105, I know bankruptcy practitioners love to cite  
19 105, but there were three or four others that I mentioned, and  
20 they're in our brief. There's no case that they cited that  
21 said that there is no authority on the gatekeeper.

22 But what was the argument that was raised? And I think  
23 Mr. Rukavina raised it, saying, you know, look, I don't  
24 understand the argument of no jurisdiction, of jurisdiction  
25 for a gatekeeper but no jurisdiction for underlying cause of

1 action. Well, Mr. Rukavina should read and Your Honor should  
2 read, when you're considering the plan, the case, the Villegas  
3 case in the Fifth Circuit as it dealt with *Stern*. That was  
4 particularly a case. Does *Barton* -- is *Barton* impacted from  
5 *Stern*? By *Stern*? And *Stern*, we know, limits the bankruptcy  
6 court's jurisdiction. But, no, the Fifth Circuit said, in  
7 that case, no. Even though the bankruptcy court's  
8 jurisdiction is limited to hear the claim, there is nothing  
9 inconsistent with that and allowing the bankruptcy court to  
10 act as a gatekeeper.

11 So Mr. Rukavina's argument that, well, he'll present to  
12 you that there's cause and you'll find there's no cause and  
13 then he will be without a remedy by someone that had  
14 jurisdiction, that really sounds good but it just doesn't  
15 withstand analytic scrutiny. There is a distinction. They  
16 are glossing over the distinction. They don't like the  
17 distinction.

18 And why is that distinction -- and why is it important in  
19 this case? Again, we're not talking about garden-variety  
20 people who are just involved with a debtor and will get caught  
21 up in a bankruptcy. We narrowly tailored the gatekeeper to  
22 enjoined parties. Enjoined parties are the people before Your  
23 Honor, some of the people that have made the Debtor's life  
24 miserable over the last few months.

25 We have every interest and desire, as does the Committee,

1 to go out post-confirmation and monetize these assets. But we  
2 see the clouds on the horizon. We see all the pleadings that  
3 have been filed by the Objectors saying how, if there's no  
4 deal, there will be an unending amount of costs and appeals.  
5 It's, you know, the point, not too subtle. It wasn't lost on  
6 us.

7 Your Honor, going to Mr. Rukavina's arguments on Class 8  
8 cram down, again, it's really a hard argument to understand,  
9 but first I want to make a point. He sort of mentioned -- and  
10 I'm not sure if he intends to preserve this on appeal, but it  
11 was not objected to and I'll ask for a ruling on it, Your  
12 Honor -- he said that there was inappropriate separate  
13 classification. That was not raised in any of the objections.  
14 We don't think it was properly before the Court. We  
15 understand there's a component of that in unfair  
16 discrimination in connection with a cram down, but there is no  
17 objection, there was no filed objection, to the separate  
18 classification of the deficiency claims and the Class 8  
19 unsecured claims.

20 And if you look at the voting, you realize it wasn't done  
21 for gerrymandering, because if you put both claims together,  
22 both classes together, you would have had one class that voted  
23 yes.

24 So I don't believe the separate classification under the  
25 1129 standards is appropriate for Your Honor to consider,

1 other than in connection with the cram down.

2 Now, Mr. Rukavina complains that the only way the  
3 convenience class was decided was by way of negotiation. Your  
4 Honor, how else do provisions like that get decided? And who  
5 was the negotiation between? It was between the Committee.  
6 And one of the benefits of a Committee process, and I  
7 represent a lot of Committees, you put people in a Committee  
8 that have diverse interests and they can come up with an  
9 appropriate result. And here you have that. You had one  
10 creditor who was a convenience creditor. You have three other  
11 creditors who would lose liquidity if convenience payments are  
12 made.

13 Do you think that UBS, Acis and Redeemer, do you think  
14 they had a desire just to pay people off? No. It was part of  
15 a collaborative process. So to say that there was no basis  
16 and no testimony on the appropriateness to have -- and how the  
17 convenience class was put together just would be wrong.

18 And with respect to the absolute priority rule, Your  
19 Honor, again, there's a missing link here, okay? These are  
20 contingent interests. They are property. No doubt they are  
21 property. But if I did not allow those creditors or those  
22 equity to have a contingent interest, the argument would have  
23 been made that the plan violates the absolute priority rule.  
24 And I said that in my argument. And why would it have  
25 violated the absolute priority rule? Because there's a

1 potential that creditors could get over a hundred cents on the  
2 dollar, plus interest. So it's a game of gotcha, right?

3 And why do they really care? Mr. Dugaboy said in his --  
4 Mr. Draper said in his brief that Dugaboy cares because they  
5 may have wanted to buy the interest. Well, I'm sure they can  
6 go to Hunter Mountain, you know, Mr. Dondero's left hand can  
7 go to his right hand, and I'm sure he'd be happy to sell the  
8 contingent interests.

9 And with respect to the argument that Mr. Rukavina made  
10 about control, equity be in control, yeah, control is a right.  
11 No doubt. You've got -- if you're giving control to the post-  
12 confirmation Debtor, that could be a right and implicate the  
13 absolute priority rule. But what is the control here? Equity  
14 is not given any rights. Your Honor heard how the post-  
15 confirmation entity is structured. It's going to be Mr.  
16 Seery, overseen by an Oversight Board. So I really don't  
17 understand the concept of control. There just is no violation  
18 of the absolute priority rule.

19 Your Honor, Mr. Rukavina then took us to task for 2000 --  
20 or, for not filing the 2015.3 statement. And if you take his  
21 argument to the logical conclusion -- well, we didn't file it,  
22 we didn't comply with that Rule, so we're not in compliance  
23 with the Bankruptcy Code, so we can never basically get our  
24 plan confirmed, right, because it's a violation and we didn't  
25 file and seek an extension.

1           That's just a preposterous argument, Your Honor. Mr.  
2 Seery poignantly told the Court, in the rush of things that  
3 were going on, it wasn't filed. Did Mr. Rukavina, before  
4 yesterday, having Mr. Dubel on the stand, did he ever ask  
5 where is our 2015.3 report? He probably didn't ask it because  
6 the answer -- when I told him the reason why it wasn't filed  
7 before January 9 was because I don't think Mr. Dondero wanted  
8 it filed, and I think that's why, as Mr. Seery testified, we  
9 were having a challenging time getting that information from  
10 the in-house -- in-house.

11           But, yes, should it have been filed? Yes. But if that is  
12 all they could point to through the course of the case that  
13 Mr. Seery or Mr. -- or the rest of the board did wrong, you  
14 know, I think that just demonstrates they did a fine job.

15           THE COURT: All right.

16           MR. POMERANTZ: Your Honor?

17           THE COURT: You've got four minutes left.

18           MR. POMERANTZ: Oh. Okay. Your Honor, going to Mr.  
19 Rukavina and the Strand argument that it's a nondebtor entity,  
20 as I explained in my argument, the Strand -- Strand needs to  
21 get exculpation or else that's a backdoor way to the Debtor.  
22 Forget about the independent directors, it's a backdoor way to  
23 the Debtor. Because Mr. Dondero will be in control. If  
24 Strand is sued for post-January 9th activities, he will assert  
25 an administrative claim. And one thing from *Pacific Lumber* is

1 clear, the Debtor is entitled to an exculpation as part of the  
2 injunction and the -- and the discharge.

3 Your Honor, Mr. Kharasch adequately addressed Mr.  
4 Rukavina's comments with the gatekeeper and the gatekeeper  
5 problem. We are not seeking to stop his clients, however  
6 related they may be, from exercising their rights. We are  
7 seeking a process that will not embroil the Debtor in  
8 litigation going forward. There is no problem with Your Honor  
9 acting as the gatekeeper to do so. And to the extent that  
10 they are bound by the January 9th order is not really an issue  
11 for today. That'll be an issue at the temporary -- the  
12 temporary -- at the preliminary injunction hearing.

13 I -- just one minute, Your Honor.

14 (Pause.)

15 MR. POMERANTZ: Your Honor, I think I covered a lot.  
16 If there's anything that any of the Objectors have mentioned  
17 that I failed to respond to, I'd be happy to answer questions  
18 Your Honor has.

19 THE COURT: All right. I guess there's, what, about  
20 two minutes left, if Mr. Clemente had anything.

21 Mr. Clemente, have you drifted off? I doubt it. But  
22 anything else from you, Mr. Clemente?

23 MR. TAYLOR: Your Honor, I show him talking -- this  
24 is Clay Taylor -- but no one's hearing him.

25 THE COURT: Okay. Mr. Clemente, we are not hearing

1 you, or I'm not seeing you. Make sure you're not on mute.

2 THE CLERK: He's not on mute, Judge.

3 THE COURT: He's not on mute? So we must have a  
4 bandwidth issue or something else.

5 All right. Mr. Clemente, still not hearing or seeing you.  
6 We'll give him another 30 seconds.

7 THE CLERK: He's coming up.

8 THE COURT: He's coming up? Ah, I see his name now.

9 MR. CLEMENTE: Your Honor, can you hear me?

10 THE COURT: I can hear you now.

11 MR. CLEMENTE: Okay, Your Honor. I don't know what  
12 happened. I just switched another camera, so you may not be  
13 able to see me, but can you hear me? I'll be very quick.

14 THE COURT: Okay. I can hear you.

15 MR. CLEMENTE: Can you hear me?

16 THE COURT: Yes.

17 MR. CLEMENTE: Okay. Thank you, Your Honor.

18 CLOSING ARGUMENT ON BEHALF OF THE UNSECURED CREDITORS' COMMITTEE

19 MR. CLEMENTE: Two things I want to say. First, just  
20 on Class 8, I think what's important, as my comments  
21 emphasized earlier, the structure of Class 8. We must  
22 remember what it is. It's really designed so that Class 8  
23 holders receive their pro rata share of what's left after  
24 prior claims are paid. That's really what Class 8 creditors  
25 voted on. That's what the disclosure provided. They did not

1 vote on receiving a specific dollar or a specific recovery  
2 percentage.

3 And regarding the projections and estimates, Your Honor,  
4 we're talking about large litigation claims that were asserted  
5 and then settled. And given the nature of these assets, the  
6 values fluctuate. It's perfectly expected, Your Honor, and  
7 indeed disclosed, that there could be wide swings in the  
8 amount of claims. That does not lead to the conclusion that  
9 the plan needs to be resolicited.

10 And then, finally, Your Honor, again, Mr. Pomerantz  
11 adequately addressed all the points, as he did with his  
12 earlier presentation, so I'm not going to touch on them, but I  
13 did want to respond to one thing that Mr. Taylor said. And I,  
14 of course, agree with Mr. Pomerantz. The Committee believes  
15 there's no reason for you to delay a ruling and would in fact  
16 urge you to rule as soon as Your Honor is ready to rule.  
17 Confirmation of the plan, to the extent that there are  
18 conversations occurring, is not going to prevent those  
19 conversations from taking place, and they can continue after  
20 the plan is confirmed. There's simply nothing inherent in  
21 Your Honor confirming the plan that would prevent those  
22 conversations from occurring or would ultimately prevent  
23 parties from pivoting to a deal on the off-chance that one  
24 should be reached.

25 So I just wanted to emphasize, Your Honor, again, Your

1 Honor is going to rule when Your Honor rules, but the  
2 Committee would urge you to rule, and certainly the idea that  
3 there may or may not be discussions with Mr. Dondero should  
4 not at all in any way lead you to the conclusion that you  
5 shouldn't rule or that those conversations cannot continue  
6 after plan confirmation.

7 Thank you, Your Honor. Unless you have questions for me.  
8 And my apologies with the technology.

9 THE COURT: No problem. All right. Here's what I'm  
10 going to do. We can see you now, Mr. Clemente.

11 MR. CLEMENTE: Oh. I'm sorry, Your Honor. I  
12 switched to another camera again because it wasn't working.  
13 So, I apologize.

14 THE COURT: All right. I am going to call you back  
15 Monday. What day of the week will that be? Is that -- I  
16 mean, Monday, what date, I should say. That'll be the 8th,  
17 right? I am going to call you back Monday, this coming  
18 Monday, February 8th, at 9:30 Central time, and I am going to  
19 give you my ruling. It will be a detailed oral bench ruling.  
20 And I'm not going to leave you hanging on the edge of your  
21 seat over the next few days. I will tell you I'm inclined to  
22 confirm this plan. I think it meets all of the requirements  
23 of 1129 and 1123 and 1122.

24 The thing that I am going to spend some time thinking  
25 about between now and Monday morning is, no surprise, the

1 propriety of the exculpations, the propriety of the plan  
2 injunctions, the propriety of the gatekeeper provisions. I  
3 certainly am duty-bound to go back and reread *Pacific Lumber*,  
4 to go back and read *Thru, Inc.*, and to really think hard about  
5 what is happening here.

6 So, I'm pretty much down, I think, to just those three  
7 issues here. I'll talk to my law clerk. He may remind me of  
8 something else that I'm not articulating right now. But I  
9 think I'm just down to those issues. Okay? So it's not going  
10 to be a mystery very long. We will come back Monday, 9:30.  
11 My courtroom deputy will post on the docket the WebEx  
12 connection instructions as usual, and we'll go from there.  
13 Now, --

14 MR. POMERANTZ: Your Honor? Your Honor, this is Jeff  
15 Pomerantz. I have a question, and it's going to sound odd  
16 coming from someone on the West Coast, but I was wondering if  
17 you could do it earlier. And the only reason I say that is,  
18 the night before, I have to call in to see if I'm on jury duty  
19 on Monday, and it would be helpful to me -- I assume your  
20 reading the ruling would be within a half hour, 45 minutes.  
21 That if you started at 9:00, if that was possible, I could  
22 then get in a car, and if I'm actually called to jury duty, I  
23 can get there. Of course, I don't know if I will be called,  
24 but I'd hate to miss it.

25 THE COURT: Okay. Well, I don't want to make you

1 miss jury duty. Okay. We will do 9:00 o'clock.

2 MR. POMERANTZ: Thank you, Your Honor.

3 THE COURT: Hopefully no one will be, you know, hung  
4 over from watching the Super Bowl. Personally, I don't like  
5 Tom Brady, so I may be boycotting the Super Bowl. But maybe  
6 I'll watch it. Maybe I'll -- I'll watch it. So we'll do it  
7 9:00 o'clock. So 9:00 o'clock next Monday.

8 Now, let's talk about next the currently-set hearing this  
9 Friday, February 5th, on the injunction and contempt of court  
10 motion as to Mr. Dondero and the other entities. I want to  
11 continue that, and here is what I am struggling with. The  
12 only day I have next week is Friday, the 12th, and I would  
13 rather not use that date because I'm pretty jam-packed Monday  
14 through Thursday, unless stuff has been settled that I haven't  
15 become aware of. So let me ask two things. First, when is  
16 the examiner motion set? I'm just wondering if there's a  
17 block of time we have coming up that --

18 MR. POMERANTZ: I believe that's March 2nd, Your  
19 Honor, so that's not for another month.

20 THE COURT: Oh, that's not for another month? All  
21 right.

22 Traci, are you on the line? I want to ask you --

23 THE CLERK: Yes, I am.

24 THE COURT: What about the following week? I know  
25 Monday, the 15th, is a federal holiday, but do we have

1 availability for -- I fear a full day is going to be needed  
2 for continuing this Friday setting.

3 THE CLERK: Wednesday, February 17th, is available.

4 THE COURT: We've got all day on Wednesday, February  
5 17th?

6 THE CLERK: Yes.

7 THE COURT: All right. What about that? I think I  
8 heard Mr. Rukavina, I think he's the one who threw it out  
9 there -- or maybe it was Mr. Taylor; I'm getting mixed up --  
10 the possibility that they would agree to a continuation of the  
11 preliminary injunction through -- well, I think you said  
12 through confirmation. Until the Court enters a confirmation  
13 order. And if I were to rule and approve confirmation Monday,  
14 then we're talking about an order that might be entered sooner  
15 than the 17th. So, do you all have any --

16 MR. RUKAVINA: Your Honor?

17 THE COURT: -- mutually-agreeable suggestions? If  
18 not, I'm just going to set it the 12th and I'll, you know, I'm  
19 killing myself, but I'll --

20 MR. TAYLOR: Your Honor?

21 MR. RUKAVINA: No, Your Honor. I think Your Honor is  
22 wise to do what's she's proposing. The agreed TRO against my  
23 clients expires on the 15th of February.

24 THE COURT: Uh-huh.

25 MR. RUKAVINA: We can easily move that back a week or

1 a sufficient amount of time so that there's no prejudice by  
2 going on the 17th, if that would be acceptable to the Debtor,  
3 and then we can just pick a date that's sufficiently after the  
4 PI hearing so that there's protection for everyone.

5 THE COURT: All right. Mr. Taylor, do you agree?

6 MR. TAYLOR: Yes, Your Honor. That is acceptable to  
7 Mr. Dondero.

8 THE COURT: Okay.

9 MR. TAYLOR: We can also push it back. Can you hear  
10 me?

11 THE COURT: Yes, I can. Uh-huh.

12 MR. TAYLOR: Okay.

13 THE COURT: All right.

14 MR. POMERANTZ: I just want to make -- I just want to  
15 make sure Mr. Morris, John Morris, is on, since he's taking  
16 the lead in those matters. I don't see his picture.

17 MR. MORRIS: I am, Jeff, and I appreciate that. I'm  
18 available, Your Honor. We were supposed to take the  
19 depositions of Mr. Leventon and Mr. Ellington tomorrow. I  
20 don't know if their counsel is on the phone. But given Your  
21 Honor's decision to adjourn the hearing from Friday, I would  
22 respectfully request at this time that counsel for those two  
23 individuals work with me to find a date next week in order to  
24 take those depositions.

25 THE COURT: All right. That's --

1 MS. DANDENEAU: Debra Dandeneau from --

2 THE COURT: Go ahead.

3 MS. DANDENEAU: This is Debra Dandeneau from Baker  
4 McKenzie. We agree, and we're happy to work with you on a  
5 rescheduled time.

6 MR. MORRIS: Thank you very much.

7 THE COURT: All right. All right. So, someone had  
8 filed a motion to continue Friday's hearing. I think it was  
9 your firm, Mr. Taylor. I already had a motion pending for a  
10 few days now. So I'm going to direct you to upload an order,  
11 Mr. Taylor, or someone at your firm, continuing the hearing to  
12 the 17th at 9:30, with language in there that your -- the  
13 injunction is continuing at least through that date. And,  
14 again, it's a continuance of the motion for contempt as well  
15 as the setting on the preliminary injunction. And, of course,  
16 run that by Mr. Morris and Mr. Rukavina.

17 MR. TAYLOR: Sure. Your Honor, this is -- I'm not  
18 handling the injunction hearing, or at least I don't think I  
19 am. But just so that I'm clear, should maybe the injunction  
20 continue through the next day or something, so depending on  
21 how Your Honor rules, there's not a rush to try and get an  
22 order to you?

23 MR. RUKAVINA: Your Honor, I think that Mr. Morris  
24 and I can work this out. Mr. Taylor is not involved in that  
25 adversary, that's true, but Mr. Morris and I will be able to

1 very quickly enter a proposed agreed order that extends that  
2 TRO for some period of time.

3 THE COURT: Okay.

4 MR. RUKAVINA: I'm not going to be difficult.

5 THE COURT: Okay. So we'll shift to you and Mr.  
6 Morris to be the scriveners. I just -- I suggested that  
7 because I thought there was a motion to link the order to that  
8 had been filed by Bonds Ellis. I may be --

9 MR. MORRIS: There was, Your Honor. There was an  
10 emergency motion to continue. We filed an opposition, and  
11 Your Honor has not yet ruled on that motion. You're exactly  
12 right.

13 THE COURT: Okay. All right.

14 MR. TAYLOR: Your Honor, this is Clay Taylor. I will  
15 make sure the right people confer with Davor and John, and  
16 we'll get -- we'll link it to that motion, because that makes  
17 sense, to have something to link it to.

18 THE COURT: Okay. Yes. And it can be a two-  
19 paragraph order, I would think.

20 All right. And then so I'm going to see you Monday at  
21 9:00 o'clock Central time with the ruling.

22 Please, don't anyone file anymore paper. I threw that out  
23 earlier today. I've got all the paper I need. And I will see  
24 you Monday at 9:00 o'clock. Okay? We're adjourned.

25 MR. POMERANTZ: Thank you, Your Honor.

1 THE CLERK: All rise.

2 MR. MORRIS: Thank you, Your Honor.

3 (Proceedings concluded at 4:34 p.m.)

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CERTIFICATE

21 I certify that the foregoing is a correct transcript from  
the electronic sound recording of the proceedings in the  
22 above-entitled matter.

23 /s/ **Kathy Rehling**

02/05/2021

24

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25 Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

Date

002037

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1 IN THE UNITED STATES BANKRUPTCY COURT  
2 FOR THE NORTHERN DISTRICT OF TEXAS  
3 DALLAS DIVISION

4 In Re: ) **Case No. 19-34054-sgj-11**  
5 HIGHLAND CAPITAL ) Chapter 11  
6 MANAGEMENT, L.P., )  
7 Debtor. ) Dallas, Texas  
8 ) Monday, February 8, 2021  
9 ) 9:00 a.m. Docket  
10 ) BENCH RULING ON CONFIRMATION  
11 ) HEARING [1808] AND AGREED  
12 ) MOTION TO ASSUME [1624]  
13 )  
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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,  
UNITED STATES BANKRUPTCY JUDGE.

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25 Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

1                   DALLAS, TEXAS - FEBRUARY 8, 2021 - 9:08 A.M.

2                   THE COURT: Please be seated.

3                   (Beeping.)

4                   THE COURT: Someone needs to turn off their whatever.

5                   All right. Good morning. This is Judge Jernigan, and we  
6 have scheduled today a bench ruling regarding the Debtor's  
7 plan that we had a confirmation trial on last week. This is  
8 Highland Capital Management, LP, Case No. 19-34054.

9                   Let me first make sure we've got Debtor's counsel on the  
10 line. Do we have --

11                  MR. POMERANTZ: Yes.

12                  THE COURT: -- Mr. Pomerantz?

13                  MR. POMERANTZ: Yes, Your Honor. Good morning, Your  
14 Honor. Jeff Pomerantz; Pachulski Stang Ziehl & Jones; on  
15 behalf of the Debtor.

16                  THE COURT: Okay. Good morning. Do we have the  
17 Creditors' Committee on the phone?

18                  MR. CLEMENTE: Good morning, Your Honor. Matthew  
19 Clemente of Sidley Austin on behalf of the Creditors'  
20 Committee.

21                  THE COURT: Good morning. All right. We had various  
22 Objectors. Do we have Mr. Dondero's counsel on the phone?

23                  MR. LYNN: Yes, Your Honor. Michael Lynn, together  
24 with John Bonds and Bryan Assink, for Jim Dondero.

25                  THE COURT: Good morning. For the Trusts, the

1 Dugaboy and Get Good Trusts, do we have Mr. Draper?

2 MR. DRAPER: Yes. Douglas Draper is on the line,  
3 Your Honor.

4 THE COURT: Good morning. Now, for what I'll call  
5 the Funds and Advisor Objectors, do we have Mr. Rukavina and  
6 your crew on the line?

7 MR. RUKAVINA: Davor Rukavina. And Lee Hogewood is  
8 also on the line.

9 THE COURT: All right. Good morning to you. All  
10 right. And we had objections pending from the U.S. Trustee as  
11 well. Do we have the U.S. Trustee on the line?

12 (No response.)

13 THE COURT: All right. If you're appearing, you're  
14 on mute. We're not hearing you.

15 All right. Well, we have lots of other folks. I don't  
16 mean to be neglectful of them, but we're going to get on with  
17 the ruling this morning. This is going to take a while. This  
18 is a complex matter, so it should take a while.

19 All right. Before the Court, of course, for consideration  
20 is the Debtor's Fifth Amended Plan, first filed on November  
21 24, 2020, as later modified on or around January 22, 2021,  
22 with more amendments filed on or around February 1, 2021. The  
23 Court will hereinafter refer to this as the "Plan."

24 The parties refer to the Plan as a monetization plan  
25 because it involves the gradual wind-down of the Debtor's

1 assets and certain of its funds over time, with the  
2 Reorganized Debtor continuing to manage certain other funds  
3 for a while, under strict governance and monitoring, and a  
4 Claimants Trust will receive the proceeds of that process,  
5 with the creditors receiving an interest in that trust. There  
6 is also anticipated to be Litigation Sub-Trust established for  
7 the purpose of pursuing certain avoidance or other causes of  
8 action for the benefit of creditors.

9       The recovery for general unsecured creditors is estimated  
10 now at 71 percent.

11       The Plan was accepted by 99.8 percent of the dollar amount  
12 of voting creditors in Class 8, the general unsecured class,  
13 but as to numerosity, a majority of the class of general  
14 unsecured creditors did not vote in favor of the plan.  
15 Specifically, 27 claimants voted no and 17 claimants voted  
16 yes. All but one of the rejecting ballots were cast by  
17 employees who, according to the Debtor, are unlikely to have  
18 allowed claims because they are asserted for bonuses or other  
19 compensation that will not become due.

20       Meanwhile, in a convenience class, Class 7, of general  
21 unsecured claims under one million dollars, one hundred  
22 percent of the 16 claimants who chose to vote in that class  
23 chose to accept the Plan.

24       Because of the rejecting votes in Class 8, and because of  
25 certain objections to the Plan, the Court heard two full days

1 of evidence, considering testimony from five witnesses and  
2 thousands of pages of documentary evidence, in considering  
3 whether to confirm the Plan pursuant to Sections 1129(a) and  
4 (b) of the Bankruptcy Code.

5 The Court finds and concludes that the Plan meets all of  
6 the relevant requirements of Sections 1123, 1124, and 1129 of  
7 the Code, and other applicable provisions of the Bankruptcy  
8 Code, but is issuing this detailed ruling to address certain  
9 pending objections to the Plan, including but not limited to  
10 objections regarding certain Exculpations, Releases, Plan  
11 Injunctions, and Gatekeeping Provisions of the Plan.

12 The Court reserves the right to amend or supplement this  
13 oral ruling in more detailed findings of fact, conclusions of  
14 law, and an Order.

15 First, by way of introduction, this case is not your  
16 garden-variety Chapter 11 case. Highland Capital Management,  
17 LP is a multibillion dollar global investment advisor,  
18 registered with the SEC pursuant to the Investment Advisers  
19 Act of 1940. It was founded in 1993 by James Dondero and Mark  
20 Okada. Mr. Okada resigned from his role with Highland prior  
21 to the bankruptcy case being filed. Mr. Dondero was in  
22 control of the Debtor as of the day it filed bankruptcy, but  
23 agreed to relinquish control of it on or about January 9,  
24 2020, pursuant to an agreement reached with the Official  
25 Unsecured Creditors' Committee, which will be described later.

1       Although Mr. Dondero remained on as an unpaid employee and  
2 portfolio manager with the Debtor after January 9, 2020, his  
3 employment with the Debtor terminated on October 9, 2020. Mr.  
4 Dondero continues to work for and essentially control numerous  
5 nondebtor companies in the Highland complex of companies.

6       The Debtor is headquartered in Dallas, Texas. As of the  
7 October 2019 petition date, the Debtor employed approximately  
8 76 employees.

9       Pursuant to various contractual arrangements, the Debtor  
10 provides money management and advisory services for billions  
11 of dollars of assets, including CLOs and other investments.  
12 Some of these assets are managed pursuant to shared services  
13 agreements with a variety of affiliated entities, including  
14 other affiliated registered investment advisors. In fact,  
15 there are approximately 2,000 entities in the Byzantine  
16 complex of companies under the Highland umbrella.

17       None of these affiliates of Highland filed for Chapter 11  
18 protection. Most, but not all, of these entities are not  
19 subsidiaries, direct or indirect, of Highland. And certain  
20 parties in the case preferred not to use the term "affiliates"  
21 when referring to them. Thus, the Court will frequently refer  
22 loosely to the so-called, in air quotes, "Highland complex of  
23 companies" when referring to the Highland enterprise. That's  
24 a term many of the lawyers in the case use.

25       Many of the companies are offshore entities, organized in

1 such faraway jurisdictions as the Cayman Islands and Guernsey.

2       The Debtor is privately owned 99.5 percent by an entity  
3 called Hunter Mountain Investment Trust; 0.1866 percent by the  
4 Dugaboy Investment Trust, a trust created to manage the assets  
5 of Mr. Dondero and his family; 0.0627 percent by Mark Okada,  
6 personally and through family trusts; and 0.25 percent by  
7 Strand Advisors, Inc., the general partner.

8       The Debtor's primary means of generating revenue has  
9 historically been from fees collected for the management and  
10 advisory services provided to funds that it manages, plus fees  
11 generated for services provided to its affiliates.

12       For additional liquidity, the Debtor, prior to the  
13 petition date, would sell liquid securities in the ordinary  
14 course, primarily through a brokerage account at Jefferies,  
15 LLC. The Debtor would also, from time to time, sell assets at  
16 nondebtor subsidiaries and distribute those proceeds to the  
17 Debtor in the ordinary course of business.

18       The Debtor's current CEO, James Seery, credibly testified  
19 that the Debtor was "run at a deficit for a long time and  
20 then would sell assets or defer employee compensation to cover  
21 its deficits." This Court cannot help but wonder if that was  
22 necessitated because of enormous litigation fees and expenses  
23 that Highland was constantly incurring due to its culture of  
24 litigation, as further addressed hereafter.

25       Highland and this case are not garden-variety for so many

1 reasons. One is the creditor constituency. Highland did not  
2 file bankruptcy because of some of the typical reasons a large  
3 company files Chapter 11. For example, it did not have a  
4 large asset-based secured lender with whom it was in default.  
5 It only had relatively insignificant secured indebtedness  
6 owing to Jefferies, with whom it had a brokerage account, and  
7 one other entity called Frontier State Bank.

8 Highland did not have problems with trade vendors or  
9 landlords. It did not suffer any type of catastrophic  
10 business calamity. In fact, it filed Chapter 11 six months  
11 before the COVID-19 pandemic was declared. The Debtor filed  
12 Chapter 11 due to a myriad of massive unrelated business  
13 litigation claims that it was facing, many of which had  
14 finally become liquidated or were about to become liquidated  
15 after a decade or more of contentious litigation in multiple  
16 fora all over the world.

17 The Unsecured Creditors' Committee in this case has  
18 referred to the Debtor under its former chief executive, Mr.  
19 Dondero, as a serial litigator. This Court agrees with that  
20 description. By way of example, the members of the Creditors'  
21 Committee and their history of litigation with the Debtor and  
22 others in the Highland complex are as follows:

23 First, the Redeemer Committee of the Highland Crusader  
24 Fund, which I'll call the Redeemer Committee. This Creditors'  
25 Committee member obtained an arbitration award against the

1 Debtor of more than \$190 million, inclusive of interest,  
2 approximately five months before the petition date from a  
3 panel of the American Arbitration Association. It was on the  
4 verge of having that award confirmed by the Delaware Chancery  
5 Court immediately prior to the petition date, after years of  
6 disputes that started in late 2008 and included legal  
7 proceedings in Bermuda. This creditor's claim was settled  
8 during the bankruptcy case in the amount of approximately  
9 \$137.7 million. The Court is omitting various details and  
10 aspects of that settlement.

11 The second Creditors' Committee member, Acis Capital  
12 Management, LP, which was formerly in the Highland complex of  
13 companies but was not affiliated with Highland as of the  
14 petition date. This UCC member and its now-owner, Josh Terry,  
15 were involved in litigation with Highland dating back to 2016.  
16 Acis was forced into an involuntary bankruptcy in the  
17 Bankruptcy Court for the Northern District of Texas, Dallas  
18 Division, by Josh Terry, who was a former Highland portfolio  
19 manager, in 2018 after Josh Terry obtained an approximately \$8  
20 million arbitration award and judgment against Acis that was  
21 issued by a state court in Dallas County, Texas. Josh Terry  
22 was ultimately awarded the equity ownership of Acis by the  
23 Dallas Bankruptcy Court in the Acis bankruptcy case.

24 Acis subsequently asserted a multimillion dollar claim  
25 against Highland in the Dallas Bankruptcy Court for Highland's

1       alleged denuding of Acis in fraud of its creditors, primarily  
2       Josh Terry.

3                 The litigation involving Acis and Mr. Terry dates back to  
4       mid-2016, and has continued on, with numerous appeals of  
5       bankruptcy court orders, including one appeal still pending at  
6       the United States Court of Appeals for the Fifth Circuit.

7                 There was also litigation involving Josh Terry and Acis in  
8       the Royal Court of the Island of Guernsey and in a court in  
9       New York.

10               The Acis claim was settled during this bankruptcy case in  
11      court-ordered mediation for approximately \$23 million. Other  
12      aspects and details of this settlement are being omitted.

13               Now, the third Creditors' Committee member, UBS  
14      Securities. It's a creditor who filed a proof of claim in the  
15      amount of \$1,039,000,000 in the Highland case. Yes, over one  
16      billion dollars. The UBS claim was based on the amount of a  
17      judgment that UBS received from a New York state court in 2020  
18      after a multi-week bench trial which had occurred many months  
19      earlier on a breach of contract claim against other entities  
20      in the Highland complex. UBS alleged that the Debtor should  
21      be liable for the judgment. The UBS litigation related to  
22      activities that occurred in 2008. The litigation involving  
23      UBS and Highland and its affiliates was pending for more than  
24      a decade, there having been numerous interlocutory appeals  
25      during its history.

1       The Debtor and UBS recently announced a settlement of the  
2 UBS claim, which came a few months after court-ordered  
3 mediation. The settlement is in the amount of \$50 million as  
4 a general unsecured claim, \$25 million as a subordinated  
5 claim, and \$18 million of cash coming from a nondebtor entity  
6 in the Highland complex known as Multistrat. Other aspects of  
7 this settlement are being omitted.

8       The fourth and last Creditors' Committee member is Meta-e  
9 Discovery. It is a vendor who happened to supply litigation  
10 and discovery-related services to the Debtor over the years.  
11 It had unpaid invoices on the petition date of more than  
12 \$779,000.

13       It is fair to say that the members of the Creditors'  
14 Committee in this case all have wills of steel. They fought  
15 hard before and during the bankruptcy case. The members of  
16 the Creditors' Committee are highly sophisticated and have had  
17 highly sophisticated professionals representing them. They  
18 have represented their constituency in this case as  
19 fiduciaries extremely well.

20       In addition to these Creditors Committee members, who were  
21 all embroiled in years of litigation with Highland and its  
22 affiliates in various ways, the Debtor has been in litigation  
23 with Patrick Daugherty, a former limited partner and employee  
24 of Highland, for many years in both Delaware and Texas state  
25 courts. Patrick Daugherty filed a proof of claim for "at

1 least \$37.4 million" relating to alleged breached employment-  
2 related agreements and for the tort of defamation arising from  
3 a 2017 press release posted by the Debtor.

4 The Debtor and Patrick Daugherty recently announced a  
5 settlement of the Patrick Daugherty claim in the amount of  
6 \$750,000 cash on the effective date, an \$8.25 million general  
7 unsecured claim, and a \$2.75 million subordinated claim.  
8 Other aspects and details of this settlement are being  
9 omitted.

10 Additionally, an entity known as HarbourVest, who invested  
11 more than \$70 million with an entity in the Highland complex,  
12 asserted a \$300 million proof of claim against Highland,  
13 alleging, among other things, fraud and RICO violations. The  
14 HarbourVest claim was settled during the bankruptcy case for a  
15 \$45 million general unsecured claim and a \$35 million junior  
16 claim.

17 Other than these claims just described, most of the other  
18 claims in this case are claims asserted against the Debtor by  
19 other entities in the Highland complex, most of which entities  
20 the Court finds to be controlled by Mr. Dondero; claims of  
21 employees who believe that they are entitled to large bonuses  
22 or other types of deferred compensation; and claims of  
23 numerous law firms that did work for Highland and were unpaid  
24 for amounts due to them on the petition date.

25 Yet another reason this is not your garden-variety Chapter

1       11 case is its postpetition corporate governance structure.  
2       Highland filed bankruptcy October 16, 2019. Contentiousness  
3       with the Creditors' Committee began immediately, with first  
4       the Committee's request for a change of venue from Delaware to  
5       Dallas, and then a desire by the Committee and the U.S.  
6       Trustee for a Chapter 11 or 7 trustee to be appointed due to  
7       concerns over and distrust of Mr. Dondero and his numerous  
8       conflicts of interest and alleged mismanagement or worse.

9           After many weeks of the threat of a trustee lingering, the  
10      Debtor and the Creditors' Committee negotiated and the Court  
11      approved a corporate governance settlement on January 9, 2020  
12      that resulted in Mr. Dondero no longer being an officer or  
13      director of the Debtor or of its general partner, Strand.

14           As part of the court-approved settlement, three eminently-  
15      qualified Independent Directors were chosen by the Creditors'  
16      Committee and engaged to lead Highland through its Chapter 11  
17      case. They were James Seery, John Dubel, and Retired  
18      Bankruptcy Judge Russell Nelms. They were technically the  
19      Independent Directors of Strand, the general partner of the  
20      Debtor. Mr. Dondero had previously been the sole director of  
21      Strand, and thus the sole person in ultimate control of the  
22      Debtor.

23           The three independent board members' resumes are in  
24      evidence. James Seery eventually was named CEO of the Debtor.  
25      Suffice it to say that this changed the entire trajectory of

1 the case. This saved the Debtor from a trustee. The Court  
2 trusted the new directors. The Creditors' Committee trusted  
3 them. They were the right solution at the right time.

4 Because of the unique character of the Debtor's business,  
5 the Court believed this solution was far better than a  
6 conventional Chapter 7 or 11 trustee. Mr. Seery, in  
7 particular, knew and had vast experience at prominent firms  
8 with high-yield and distressed investing similar to the  
9 Debtor's business. Mr. Dubel had 40 years of experience  
10 restructuring large, complex businesses and serving on their  
11 boards of directors in this context. And Retired Judge Nelms  
12 had not only vast bankruptcy experience but seemed  
13 particularly well-suited to help the Debtor maneuver through  
14 conflicts and ethical quandaries.

15 By way of comparison, in the Chapter 11 case of Acis, the  
16 former affiliate of Highland that this Court presided over two  
17 or three years ago, which company was much smaller in size and  
18 scope than Highland, managing only five or six CLOs, a Chapter  
19 11 trustee was elected by the creditors that was not on the  
20 normal rotation panel for trustees in this district, but  
21 rather was a nationally-known bankruptcy attorney with more  
22 than 45 years of large Chapter 11 case experience. This  
23 Chapter 11 trustee performed valiantly, but was sued by  
24 entities in the Highland complex shortly after he was  
25 appointed, which this Court had to address. The Acis trustee

1 could not get Highland and its affiliates to agree to any  
2 actions taken in the case, and he finally obtained  
3 confirmation of a plan over Highland and its affiliates'  
4 objections in his fourth attempted plan, which confirmation  
5 then was promptly appealed by Highland and its affiliates.

6 Suffice it to say it was not easy to get such highly-  
7 qualified persons to serve as independent board members and  
8 CEO of this Debtor. They were stepping into a morass of  
9 problems. Naturally, they were worried about getting sued, no  
10 matter how defensible their efforts might be, given the  
11 litigation culture that enveloped Highland historically. It  
12 seemed as though everything always ended in litigation at  
13 Highland.

14 The Court heard credible testimony that none of them would  
15 have taken on the role of Independent Director without a good  
16 D&O insurance policy protecting them, without indemnification  
17 from Strand, guaranteed by the Debtor; without exculpation for  
18 mere negligence claims; and without a gatekeeper provision,  
19 such that the Independent Directors could not be sued without  
20 the bankruptcy court, as a gatekeeper, giving a potential  
21 plaintiff permission to sue.

22 With regard to the gatekeeper provision, this was  
23 precisely analogous to what bankruptcy trustees have pursuant  
24 to the so-called "Barton Doctrine," which was first  
25 articulated in an old U.S. Supreme Court case.

1       The Bankruptcy Court approved all of these protections in  
2 a January 9, 2020 order. No one appealed that order. And Mr.  
3 Dondero signed the settlement agreement that was approved by  
4 that order.

5       An interesting fact about the D&O policy came out in  
6 credible testimony at the confirmation hearing. Mr. Dubel and  
7 an insurance broker from Aon, named Marc Tauber, both credibly  
8 testified that the gatekeeper provision was needed because of  
9 the so-called, and I quote, "Dondero Exclusion" in the  
10 insurance marketplace.

11       Specifically, the D&O insurers in the marketplace did not  
12 want to cover litigation claims that might be brought against  
13 the Independent Directors by Mr. Dondero because the  
14 marketplace of D&O insurers are aware of Mr. Dondero's  
15 litigiousness. The insurers would not have issued a D&O  
16 policy to the Independent Directors without either the  
17 gatekeeping provision or a "Dondero Exclusion" being in the  
18 policy.

19       Thus, the gatekeeper provision was part of the January 9,  
20 2020 settlement. There was a sound business justification for  
21 it. It was reasonable and necessary. It was consistent with  
22 the Barton Doctrine in an extremely analogous situation --  
23 i.e., the independent board members were analogous to a three-  
24 headed trustee in this case, if you will. Mr. Dondero signed  
25 off on it. And, again, no one ever appealed the order

1 approving it.

2       The Court finds that, like the Creditors' Committee, the  
3 independent board members here have been resilient and  
4 unwavering in their efforts to get the enormous problems in  
5 this case solved. They seem to have at all times negotiated  
6 hard and with good faith. As noted previously, they changed  
7 the entire trajectory of this case.

8       Still another reason why this was not your garden-variety  
9 case was the mediation effort. In summer of 2020, roughly  
10 nine months into the Chapter 11 case, this Court ordered  
11 mediation among the Debtor, Acis, UBS, the Redeemer Committee,  
12 and Mr. Dondero. The Court selected co-mediators, since this  
13 seemed like such a Herculean task, especially during COVID-19,  
14 where people could not all be in the same room. Those co-  
15 mediators were Retired Bankruptcy Judge Allan Gropper from the  
16 Southern District of New York, who had a distinguished career  
17 presiding over complex Chapter 11 cases, and Ms. Sylvia Mayer,  
18 who likewise has had a distinguished career, first as a  
19 partner in a preeminent law firm working on complex Chapter 11  
20 cases, and subsequently as a mediator and arbitrator in  
21 Houston, Texas.

22       As noted earlier, the Acis claim was settled during the  
23 mediation, which seemed nothing short of a miracle to this  
24 Court, and the UBS claim was settled many months later, and  
25 this Court believes the groundwork for that ultimate

1 settlement was laid, or at least helped, through the  
2 mediation. And as earlier noted, other enormous claims have  
3 been settled during this case, including that of the Redeemer  
4 Committee, who, again, had asserted approximately or close to  
5 a \$200 million claim; HarbourVest, who asserted a \$300 million  
6 claim; and Patrick Daugherty, who asserted close to a \$40  
7 million claim.

8       This Court cannot stress strongly enough that the  
9 resolution of these enormous claims and the acceptance of all  
10 of these creditors of the Plan that is now before the Court  
11 seems nothing short of a miracle. It was more than a year in  
12 the making.

13       Finally, a word about the current remaining Objectors to  
14 the Plan before the Court. Once again, the Court will use the  
15 phrase "not garden-variety." Originally, there were over one  
16 dozen objections filed to this Plan. The Debtor has made  
17 various amendments or modifications to the Plan to address  
18 some of these objections. The Court finds that none of these  
19 modifications require further solicitation, pursuant to  
20 Sections 1125, 1126, 1127 of the Code, or Bankruptcy Rule  
21 3019, because, among other things, they do not materially  
22 adversely change the treatment of the claims of any creditor  
23 or interest holder who has not accepted in writing the  
24 modifications.

25       Among other things, there were changes to the projections

1 that the Debtor filed shortly before the confirmation hearing  
2 that, among other things, show the estimated distribution to  
3 creditors and compare plan treatment to a likely disbursement  
4 in a Chapter 7.

5 These do not constitute a materially adverse change to the  
6 treatment of any creditors or interest holders. They merely  
7 update likely distributions based on claims that have now been  
8 settled, and they've otherwise incorporated more recent  
9 financial data. This happens often before confirmation  
10 hearings. The Court finds that it did not mislead or  
11 prejudice any creditors or interest holders, and certainly  
12 there was no need to resolicit the Plan.

13 The only Objectors to the Plan left at this time were Mr.  
14 Dondero and entities that the Court finds are controlled by  
15 him. The standing of these entities to object to the Plan  
16 exists, but the remoteness of their economic interest is  
17 noteworthy, and the Court questions the good faith of the  
18 Objectors. In fact, the Court has good reason to believe that  
19 these parties are not objecting to protect economic interests  
20 they have in the Debtor, but to be disruptors.

21 Mr. Dondero wants his company back. This is  
22 understandable. But it's not a good faith basis to lob  
23 objections to the Plan. The Court has slowed down  
24 confirmation multiple times on the current Plan and urged the  
25 parties to talk to Mr. Dondero. The parties represent that

1 they have, and the Court believes that they have.

2 Now, to be specific about the remoteness of the objectors'  
3 interests, the Court will address them each separately.

4 First, Mr. Dondero has a pending objection. Mr. Dondero's  
5 only economic interest with regard to the Debtor at this point  
6 is an unliquidated indemnification claim. And based on  
7 everything this Court has heard, his indemnification claim  
8 will be highly questionable at this juncture.

9 Second, a joint objection has been filed by the Dugaboy  
10 Trust and the Get Good Trust. As for the Dugaboy Trust, it  
11 was created to manage the assets of Mr. Dondero and his  
12 family, and it owns a 0.1866 percent limited partnership  
13 interest in the Debtor. The Court is not clear what economic  
14 interest the Get Good Trust has, but it likewise seems to be  
15 related to Mr. Dondero, and it has been represented to the  
16 Court numerous times that the trustee is Mr. Dondero's college  
17 roommate.

18 Another group of Objectors that has joined together in one  
19 objection is what the Court will refer to as the Highland and  
20 NexPoint Advisors and Funds. The Court understands they  
21 assert disputed administrative expense claims against the  
22 estate. While the evidence presented was that they have  
23 independent board members that run these companies, the Court  
24 was not convinced of their independence from Mr. Dondero.  
25 None of the so-called independent board members of these

1 entities have ever testified before the Court. Moreover, they  
2 have all been engaged with the Highland complex for many  
3 years.

4 The witness who testified on these Objectors' behalves at  
5 confirmation, Mr. Jason Post, their chief compliance officer,  
6 resigned from Highland after more than twelve years in October  
7 2020, at the same time that Mr. Dondero resigned or was  
8 terminated by Highland. And a prior witness recently for  
9 these entities whose testimony was made part of the record at  
10 the confirmation hearing essentially testified that Mr.  
11 Dondero controlled these entities.

12 Finally, various NexBank entities objected to the Plan.  
13 The Court does not believe they have liquidated claims. Mr.  
14 Dondero appears to be in control of these entities as well.

15 To be clear, the Court has allowed all of these objectors  
16 to fully present arguments and evidence in opposition to  
17 confirmation, even though their economic interests in the  
18 Debtor appear to be extremely remote and the Court questions  
19 their good faith. Specifically on that latter point, the  
20 Court considers them all to be marching pursuant to the orders  
21 of Mr. Dondero.

22 In the recent past, Mr. Dondero has been subject to a TRO  
23 and preliminary injunction by the Bankruptcy Court for  
24 interfering with the current CEO's management of the Debtor in  
25 specific ways that were supported by evidence. Around the

1 time that this all came to light and the Court began setting  
2 hearings on the alleged interference, Mr. Dondero's company  
3 phone supplied to him by Highland, which he had been asked to  
4 turn in, mysteriously went missing. The Court merely mentions  
5 this in this context as one of many reasons that the Court has  
6 to question the good faith of Mr. Dondero and his affiliated  
7 objectors.

8 The only other pending objection besides these objections  
9 of the Dondero and Dondero-controlled entities is an objection  
10 of the United States Trustee pertaining to the release,  
11 exculpation, and injunction provisions in the Plan.

12 In juxtaposition to these pending objections, the Court  
13 notes that the Debtor has resolved earlier-filed objections to  
14 the Plan filed by the IRS, Patrick Daugherty, CLO Holdco,  
15 Ltd., numerous local taxing authorities, and certain current  
16 and former senior-level employees of the Debtor.

17 With that rather detailed factual background addressed,  
18 because certainly context matters here, the Court now  
19 addresses what it considers the only serious objections raised  
20 in connection with confirmation. Specifically, the Plan  
21 contain certain releases, exculpation, plan injunctions, and a  
22 gatekeeper provision which are obviously not fully consensual,  
23 since there are objections. Certainly, these provisions are  
24 mostly consensual when you consider that parties with hundreds  
25 of millions of dollars' worth of legitimate claims have not

1 objected to them.

2 First, a word about plan releases generally, since the  
3 Objectors at times seem to gloss over, in this Court's view,  
4 relevant distinctions, and seem to refer to the plan releases  
5 in this Plan and the exculpations and the plan injunctions all  
6 as impermissible third-party releases, when, in fact, they are  
7 not, *per se*.

8 It has, without a doubt, become quite commonplace in  
9 complex Chapter 11 bankruptcy cases to have three categories  
10 of releases in plans. These three types are as follows.

11 First, Debtor Releases. A debtor release involves a  
12 release by the debtor and its bankruptcy estate of claims  
13 against nondebtor third-parties. For example, a release may  
14 be granted in favor of creditors, directors, officers,  
15 employees, professionals who participated in the bankruptcy  
16 process. This is the least-controversial type of release  
17 because the debtor is extinguishing its own claims, which are  
18 property of the estate, that a debtor has authority to utilize  
19 or not, pursuant to Sections 541 and 363 of the Bankruptcy  
20 Code.

21 Authority for a debtor release pursuant to a plan arises  
22 out of Section 1123(b)(3)(A), which indicates that a plan may  
23 provide for "the settlement or adjustment of any claim or  
24 interest belonging to the debtor or to the estate."

25 In this context, it would appear that the only analysis

1 required is to determine whether the release or settlement of  
2 the claim is an exercise of reasonable business judgment on  
3 that part of the debtor, is it fair and equitable, is it in  
4 the best interest of the estate, given all the relevant facts  
5 and circumstances? Also relevant is whether there's  
6 consideration given of some sort by the releasees.

7 Now, the second type of very commonplace Chapter 11 plan  
8 release is an exculpation. Chapter 11 plans also very often  
9 have these exculpation provisions, and they're something much  
10 narrower in scope and time than a full-fledged release. An  
11 exculpation provision is more like a shield for a certain  
12 subset of key actors in the case for their acts during and in  
13 connection with the case, which acts may have been merely  
14 negligent.

15 Specifically, a plan may absolve certain actors -- usually  
16 estate fiduciaries -- such as an Official Unsecured Creditors'  
17 Committee and its members, Committee professionals, sometimes  
18 Debtor professionals, senior management, officers and  
19 directors of the Debtor, from any liability for postpetition  
20 negligent conduct -- *i.e.*, conduct which occurred during the  
21 administration of the Chapter 11 case and in the negotiation,  
22 drafting, and implementation of a plan. An exculpation  
23 provision typically excludes gross negligence and willful  
24 misconduct. It is usually worded in a passive voice, so it  
25 may seem a little unclear as to whether it is actually a

1 release and by whom.

2 In any event, the rationale is that parties who actively  
3 participate in a court-approved process -- often, court-  
4 approved transactions by court order -- should receive  
5 protection for their work. Otherwise, who would want to work  
6 in such a messy, contentious situation, only to be sued for  
7 alleged negligence for less-than-perfect end results?

8 Chapter 11 end results are not always pretty. One could  
9 argue that these exculpation provisions, though, are much ado  
10 about nothing. Why? For one thing, again, the shield is only  
11 as to negligent conduct. There is no shield for other  
12 problematic conduct, such as gross negligence or willful  
13 misconduct.

14 Second, in many situations, any claims or causes of action  
15 that might arise will belong to the Debtor or its estate.  
16 Thus, they would already be released pursuant to a debtor  
17 release.

18 Additionally, there is case law stating that, where a  
19 claim is brought against an estate professional whose fees  
20 have already been approved in a final fee application, any  
21 claims are barred by *res judicata*. Thus, exculpated  
22 professionals would only have potential exposure for a very  
23 short window of time, until final fee applications.

24 Additionally, certain case law in Texas makes clear that  
25 an attorney generally does not owe any duties to persons other

1 than his own client.

2 All of this suggests that the shield of a typical  
3 exculpation provision may rarely become useful or needed.

4 Moving now to the third type of release, a true third-  
5 party release, Chapter 11 plans also sometimes contain third-  
6 party releases. A true third-party release involves the  
7 release of claims held by nondebtor third parties against  
8 other nondebtor third parties, and there is often no  
9 limitation on the scope and time of the claims released.

10 This is the most heavily scrutinized of the three types of  
11 plan releases. Much of the case authority focuses on whether  
12 a third-party release is consensual or not in analyzing their  
13 propriety and/or enforceability.

14 In *Highland*, there are no third-party releases. Rather,  
15 there are debtor releases and exculpations. There also happen  
16 to be plan injunctions and gatekeeper provisions that have  
17 been challenged. The Objectors argue that these provisions  
18 violate the Fifth Circuit's opinion in *Pacific Lumber* or are  
19 otherwise beyond the jurisdiction or authority of the  
20 bankruptcy court. These arguments are now addressed.

21 First, the debtor release is found at Article IX.D of the  
22 Plan. The language, in pertinent part, reads as follows. "On  
23 and after the effective date, each Released Party is deemed to  
24 be hereby conclusively, absolutely, unconditionally,  
25 irrevocably, and forever released and discharged by the Debtor

1 and the Estate, in each case on behalf of themselves and their  
2 respective successors, assigns, and representatives, including  
3 but not limited to the Claimant Trust and the Litigation Sub-  
4 Trust, from any and all causes of action, including any  
5 derivative claims, asserted on behalf of the Debtor, whether  
6 known or unknown, foreseen or unforeseen, matured or  
7 unmatured, existing or hereafter arising, in law, equity,  
8 contract, tort, or otherwise, that the Debtor or the Estate  
9 would have been legally entitled to assert in their own right,  
10 whether individually or collectively, or on behalf of the  
11 holder of any claim against, or interest in, a debtor or other  
12 person."

13 There are certain exceptions discussed, and then Released  
14 Parties are defined at Definition 113 of the Plan collectively  
15 as: the Independent Directors; Strand, solely from the date  
16 of the appointment of the Independent Directors through the  
17 effective date; the CEO/CRO; the Committee, the members of the  
18 Committee, in their official capacities; the professionals  
19 retained by the Debtor and the Committee in the Chapter 11  
20 case; and the employees. This is a defined term in the Plan  
21 Supplement and does not include certain employees.

22 To be clear, these are not third-party releases such as  
23 addressed in the *Pacific Lumber* case. These are the Debtor's  
24 and/or the bankruptcy estate's causes of action that are  
25 proposed to be released. Releases by a debtor are

1       discretionary and can be provided by a debtor to persons who  
2       have provided consideration to the debtor and the estate.  
3       Section 1123(b) (3) (A) of the Bankruptcy Code permits this.

4           The evidence here supported the notion that these releases  
5       are a *quid pro quo* for the Released Parties' significant  
6       contributions to a highly complex and contentious  
7       restructuring. The Debtor is releasing its own claims. Some  
8       of the Released Parties would have indemnification rights  
9       against the Debtor. And the Debtor's CEO, James Seery,  
10      credibly testified that he does not believe any claims exist  
11     as to the Released Parties. The Court approves the Debtor  
12     releases and overrules the objections to them.

13       Next, the exculpations appear at Article IX.C of the Plan  
14     and provide as follows: Subject in all respects to Article  
15     XII.D of the Plan, to the maximum extent permitted by  
16     applicable law, no Exculpated Party will have or incur, and  
17     each Exculpated Party is hereby exculpated from, any claim,  
18     obligation, suit, judgment, damage, demand, debt, right, cause  
19     of action, remedy, loss, and liability for conduct occurring  
20     on or after the petition date in connection with or arising  
21     out of the filing and administration of the Chapter 11 case,  
22     the negotiation and pursuit of a disclosure statement, the  
23     Plan, or the solicitation of votes for or confirmation of the  
24     Plan, the funding or consummation of the Plan, or any related  
25     agreements, instruments, et cetera, et cetera, whether or not

1 such Plan distributions occur following the effective date,  
2 the implementation of the Plan, and any negotiation,  
3 transactions, and documentation in connection with the  
4 foregoing clauses, provided, however, the foregoing will not  
5 apply to any acts or omissions of any Exculpated Party arising  
6 out of or related to acts or omissions that constitute bad  
7 faith, fraud, gross negligence, criminal misconduct, or  
8 willful misconduct; or Strand or any employee other than with  
9 respect to actions taken by such entities from the date of  
10 appointment of the Independent Directors through the effective  
11 date.

12       Exculpated Parties are later defined at Section -- or,  
13 earlier defined at Section 62 of the Plan, Definition No. 62  
14 of the Plan, as later limited by the Debtor, as announced in  
15 the confirmation hearing. And so these are the Exculpated  
16 Parties: the Debtor and its successors and assigns; the  
17 employees, certain employees, as defined; Strand; the  
18 Independent Directors; the Committee, the members of the  
19 Committee, in their official capacities; the professionals  
20 retained by the Debtor and the Committee in the Chapter 11  
21 case; the CEO and CRO; and the related persons as to each of  
22 these parties listed in Part (iv) through (viii) above;  
23 provided, for the avoidance of doubt, and it goes on to say  
24 Dondero, Mark Okada, and various others aren't Exculpated  
25 Parties.

1       Now, as earlier mentioned, the Objectors argue that  
2 *Pacific Lumber*, 584 F.3d 229, a Fifth Circuit case from 2009,  
3 categorically rejects the permissibility of nonconsensual  
4 exculpations as well as third-party releases in a Chapter 11  
5 plan. So the Court is going to take a deep dive into that  
6 assertion.

7       In *Pacific Lumber*, the Fifth Circuit reviewed on appeal  
8 numerous challenges to a confirmed plan of affiliated debtors  
9 known as Palco and Scopac and four subsidiaries. The debtor  
10 Palco owned and operated the sawmill, a power plant, and even  
11 a town called Scotia, California. The debtor Scopac owned  
12 timberlands. A creditor, a secured creditor called Marathon  
13 had a claim against Palco's assets. Marathon estimated  
14 Palco's assets were worth \$110 million. Its claim was \$160  
15 million. Meanwhile, other parties had large secured claims  
16 against the other debtor, Scopac.

17       The plan that the bankruptcy court confirmed, which was on  
18 appeal to the Fifth Circuit, was filed by both the secured  
19 creditor Marathon and a joint plan proponent called MRC. MRC  
20 was a competitor of the debtor Palco. The Marathon/MRC plan  
21 proposed to dissolve all the debtors, cancel intercompany  
22 debts, and create two new entities, Townco and Newco. Almost  
23 all of the debtor Palco's assets, including the town of  
24 Scotia, California, would be transferred to Townco. The  
25 timberlands and other assets, including the sawmill, would be

1 placed in Newco.

2 Marathon and MRC proposed to contribute \$580 million to  
3 Newco to pay claims against Scopac. And Marathon would  
4 convert its secured claim against Palco's assets into equity,  
5 giving it full ownership of Townco, a 15 percent stake in  
6 Newco, and a new note for the sawmill's working capital. MRC  
7 would own the other 80 percent of Newco and would manage and  
8 run the company.

9 An indenture trustee for the secured indebtedness against  
10 Scopac -- which, by the way, had also been a plan proponent of  
11 a competing plan -- appealed the confirmation order, raising  
12 eight distinct issues on appeal. One of the eight issues  
13 pertained to what the Fifth Circuit referred to as a  
14 "nondebtor exculpation and release clause." This issue is  
15 discussed on the last two pages of a very lengthy opinion.

16 While the complained-of provision is not quoted verbatim  
17 in the *Pacific Lumber* opinion, it appears to have been a  
18 typical exculpation clause. Not a third-party release; a  
19 typical exculpation clause. The Fifth Circuit stated, "The  
20 plan releases MRC, Marathon, Newco, Townco, and the Unsecured  
21 Creditors' Committee, and their personnel, from liability,  
22 other than for willful and gross negligence related to  
23 proposing, implementing, and administering the plan" at Page  
24 251.

25 The Fifth Circuit held that "the nondebtor releases must

1 be struck except with respect to the Creditors' Committee and  
2 its members."

3 Footnote 26 of the opinion also states that the appellants  
4 had "not briefed why Newco and Townco or their officers and  
5 directors should not be released," and so "we do not analyze  
6 their position." Rather, the Fifth Circuit merely analyzed  
7 why the exculpation provision was not permissible as to the  
8 two plan proponents, MRC and Marathon.

9 Thus, the Court views *Pacific Lumber* as being a holding  
10 that squarely addressed the propriety of two plan proponents,  
11 a secured lender and a third-party competitor purchaser of the  
12 Debtors, obtaining nonconsensual exculpation in the plan.  
13 However, its reasoning certainly cannot be ignored, strongly  
14 suggesting it would not be inclined to approve an exculpation  
15 for any party other than a Creditors' Committee or its  
16 members.

17 As far as the Fifth Circuit's reasoning, it relied on  
18 Bankruptcy Code Section 524(e) for striking down the  
19 exculpations, stating, "The law states, however, that  
20 discharge of a debt of the debtor does not affect the  
21 liability of any other entity on such debt." Page 251. The  
22 opinion suggests that MRC and Marathon may have tried to argue  
23 that 524(e) did not apply to their exculpations because MRC  
24 and Marathon were not liable as co-obligors in any way on any  
25 of the debtor's debt.

1       The Fifth Circuit seemed dismissive of this argument,  
2 stating as follows, "MRC/Marathon insist the release clause is  
3 part of their bargain because, without the clause, neither  
4 company would have been willing to provide the plan's  
5 financing. Nothing in the records suggests that MRC/Marathon,  
6 the Committee, or the Debtor's officers and directors were co-  
7 liable for the Debtor's prepetition debts. Instead, the  
8 bargain the proponents claim to have purchased is exculpatation  
9 from any negligence that occurred during the course of the  
10 case. Any costs the released parties might incur defending  
11 against suits alleging such negligence are unlikely to swamp  
12 either of these parties or the consummated reorganization. We  
13 see little equitable about protecting the released nondebtors  
14 from negligence suits arising out of the reorganization."

15       The Court goes on to note that, in a variety of cases,  
16 that releases have been approved, but these cases "seem  
17 broadly to foreclose nonconsensual nondebtor releases and  
18 permanent injunctions."

19       The Court then adds at Footnote 27 that the Fifth Circuit  
20 in the past did not set aside challenged plan releases that  
21 were in final nonappealable orders and were the subject of  
22 collateral attack much later, citing its famous *Republic*  
23 *Supply v. Shoaf* case, where the Fifth Circuit ruled that *res*  
24 *judicata* barred a debtor from bringing a claim that was  
25 specifically and expressly released by a confirmed

1 reorganization plan because the debtor -- the objector failed  
2 to object to the release at confirmation.

3       The Fifth Circuit in *Pacific Lumber* also noted that the  
4 Bankruptcy Code permits bankruptcy courts to enjoin third-  
5 party asbestos claims under certain circumstances, 524(g),  
6 which the Court said suggests nondebtor releases are most  
7 appropriate as a method to channel mass tort claims towards a  
8 specific pool of assets, citing numerous cases, including  
9 *Johns-Manville*.

10       In reach its holding, the Fifth Circuit saw no reason to  
11 uphold exculpation to the plan proponents MRC and Marathon,  
12 seeming to find it inconsistent with 524(e) under the facts at  
13 bar, but the Court did uphold exculpation for the Creditors'  
14 Committee and its members, stating, "We agree, however, with  
15 courts that have held that 1103(c) under the Code, which lists  
16 the Creditors' Committee's powers, implies Committee members  
17 have qualified immunity for actions within the scope of their  
18 duties." Numerous cites. "The Creditors' Committee and its  
19 members are the only disinterested volunteers among the  
20 parties sought to be released here. The scope of protection,  
21 which does not insulate them from willful and gross  
22 negligence, is adequate."

23       Thus, the Court held that the exculpation provisions in  
24 *Pacific Lumber* must be struck except with regard to the  
25 Creditors' Committee and its members.

1       Now, after all of that, this Court believes the following  
2 can be gleaned from *Pacific Lumber*. First, the Fifth Circuit  
3 hinted that consensual exculpations and/or consensual  
4 nondebtor third-party releases are permissible. The Court  
5 was, of course, dealing with nonconsensual exculpations in  
6 *Pacific Lumber*. In this regard, I note Page 252, where the  
7 Court cited various prior Fifth Circuit authority and then  
8 stated, "These cases seem broadly to foreclose nonconsensual  
9 nondebtor releases and permanent injunctions."

10       The second thing that can be gleaned from *Pacific Lumber*:  
11 The Fifth Circuit hinted that nondebtor releases may be  
12 permissible in cases involving global settlements of mass  
13 claims against the debtors and co-liable parties. The Court,  
14 of course, referred to 524(g), but various other cases which  
15 approved nondebtor releases where mass claims were channeled  
16 to a specific pool of assets.

17       Third, the Fifth Circuit outright held that exculpations  
18 from negligence for a Creditors' Committee and its members are  
19 permissible because the concept is both consistent with  
20 1103(c), "which implies Committee members have qualified  
21 immunity for actions within the scope of their duties," and a  
22 good policy result, since "if members of the Committee can be  
23 sued by persons unhappy with the outcome of the case, it will  
24 be extremely difficult to find members to serve on an official  
25 committee."

1           Fourth, the Fifth Circuit recognized in *Pacific Lumber*  
2 that *res judicata* may bar complaints regarding an  
3 impermissible plan release, citing to its earlier *Republic*  
4 *Supply v. Shoaf* opinion.

5           Now, being ever-mindful of the Fifth Circuit's words in  
6 *Pacific Lumber*, this Court cannot help but wonder about at  
7 least three things.

8           First, did the Fifth Circuit leave open the door that  
9 facts/equities might sometimes justify approval of an  
10 exculpation for a person other than a Creditors' Committee and  
11 its members? For example, the Fifth Circuit stated, in  
12 referring to the plan proponents Marathon and MRC, that "Any  
13 costs the released parties might incur defending against suits  
14 alleging such negligence are unlikely to swamp either of these  
15 parties or the consummated reorganization." Here, this Court  
16 can easily expect the proposed exculpated parties to incur  
17 costs that could swamp them and the reorganization based on  
18 the past litigious conduct of Mr. Dondero and his controlled  
19 entities. Do these words of the Fifth Circuit hint that  
20 equities/economics might sometimes justify an exculpation?

21           Second, did the Fifth Circuit's rationale for permitted  
22 exculpations to Creditors' Committee and their members, which  
23 was clearly policy-based, based on their implied qualified  
24 immunity flowing from their duties in Section 1103 and their  
25 disinterestedness, and the importance of their role in a

1 Chapter 11 case, did this rationale leave open the door to  
2 sometimes permitting exculpations to other parties in a  
3 particular Chapter 11 case besides Creditors' Committees and  
4 their members? For example, in a situation such as the  
5 Highland case, in which Independent Directors, brought in to  
6 avoid a trustee, are more like a Creditors' Committee than an  
7 incumbent board of directors.

8       Third, the Fifth Circuit's sole statutory basis was  
9 Section 524(e). This Court would humbly submit that this is a  
10 statute dealing with prepetition liability in which some  
11 nondebtor is liable with the Debtor. Exculpation is a concept  
12 dealing with postpetition liability.

13       The Ninth Circuit recently, in a case called *Blixseth v.*  
14 *Credit Suisse*, 961 F.3d 1074 (9th Cir. 2020), approved the  
15 validity of an exculpation clause incorporated into a  
16 confirmed Chapter 11 plan that purported to absolve certain  
17 nondebtor parties that were "closely involved" in drafting the  
18 plan. They were the largest secured creditor, a purchaser,  
19 and an individual who was an indirect owner of certain of the  
20 debtor companies. The exculpation was from any negligence,  
21 liability, for "any act or omission in connection with,  
22 related to, or arising out of the Chapter 11 cases."

23       By the time the appeal was before the Ninth Circuit, the  
24 only issue was the propriety of the exculpation clause as to  
25 the large secured creditor, which was also a plan proponent,

1 since all the other exculpated parties had settled with the  
2 appellant.

3 The Court, in determining that the exculpation clause was  
4 permissible as to the secured lender, concluded that Section  
5 524(e) "does not bar a narrow exculpation clause of the kind  
6 here at issue -- that is, one focused on actions of various  
7 participants in the plan approval process and relating only to  
8 that process," Page 1082. Why? Because "Section 524(e)  
9 establishes that discharge of a debt of the debtor does not  
10 affect the liability of any other entity on such debt." In  
11 other words, the discharge in no way affects the liability of  
12 any other entity for the discharged debt. By its terms,  
13 524(e) prevents a bankruptcy court from extinguishing claims  
14 of creditors against nondebtors over the very discharged debt  
15 through the bankruptcy proceedings.

16 The Court went on to explicitly disagree with *Pacific*  
17 *Lumber* in its analysis of 524(e), reiterating that an  
18 exculpation clause covers only liabilities arising from the  
19 bankruptcy proceedings and not of any of the debtor's  
20 discharged debt. Footnote 7, Page 1085.

21 Ultimately, the Court held that under Section 105(a),  
22 which empowers a bankruptcy court to issue any order, process,  
23 or judgment that is necessary or appropriate to carry out the  
24 provisions of Chapter 11 and Section 1123, which establishes  
25 the appropriate content of the bankruptcy plan, under these

1 sections, the bankruptcy court had authority to approve an  
2 exculpation clause intended to trim subsequent litigation over  
3 acts taken during the bankruptcy proceedings and so render the  
4 plan viable.

5 This Court concludes that, just as the Fifth Circuit left  
6 open the door for consensual exculpations and releases in  
7 *Pacific Lumber*, just as it left open the door for consensual  
8 exculpations and releases in *Pacific Lumber*, its dicta  
9 suggests that an exculpation might be permissible if there is  
10 a showing that "costs that the released parties might incur  
11 defending against suits alleging such negligence are likely to  
12 swamp either the Exculpated Parties or the reorganization."  
13 Again, that was a quote from the Fifth Circuit.

14 If ever there were a risk of that happening in a Chapter  
15 11 reorganization, it is this one. The Debtor's current CEO  
16 credibly testified that Mr. Dondero has said outside the  
17 courtroom that if Mr. Dondero's own pot plan does not get  
18 approved, that he will "burn the place down." Here, this  
19 Court can easily expect the proposed exculpated parties might  
20 expect to incur costs that could swamp them and the  
21 reorganization process based on the past litigious conduct of  
22 Mr. Dondero and his controlled entities.

23 Additionally, this Court concludes that the Fifth  
24 Circuit's rationale in *Pacific Lumber* for permitted  
25 exculpations to Creditors' Committees and their members, which

1 was clearly policy-based based on their implied qualified  
2 immunity flowing from Section 1103 and their importance in a  
3 Chapter 11 case, leaves the door open to sometimes permitting  
4 exculpations to other parties in a particular Chapter 11 case  
5 besides a UCC and its members.

6 Again, if there was ever such a case, the Court believes  
7 it is this one, in which Independent Directors were brought in  
8 to avoid a trustee and are much more like a Creditors'  
9 Committee than an incumbent board of directors. While,  
10 admittedly, there are a few exculpated parties here proposed  
11 beyond the independent board, such as certain employees, it  
12 would appear that no one is invulnerable to a lawsuit here if  
13 past is prologue in this Highland saga.

14 The Creditors' Committee was initially not keen on  
15 exculpations for certain employees. However, Mr. Seery  
16 credibly testified that there was a contentious arm's-length  
17 negotiation over this and that he needs these employees to  
18 preserve value implementing the Plan. Mr. Dondero has shown  
19 no hesitancy to litigate with former employees in the past, to  
20 the *nth* degree, and there is every reason to believe he would  
21 again in the future, if able.

22 Finally, in this situation, in the case at bar, we would  
23 appear to have a *Shoaf* reason to approve the exculpations.  
24 The January 9, 2020 order of this Court, Docket Entry 339,  
25 which approved the independent board and an ongoing corporate

1 governance structure for this case, and which is incorporated  
2 into the Plan at Article IX.H, provided as follows: "No  
3 entity may commence or pursue a claim or cause of action of  
4 any kind against any Independent Director, any Independent  
5 Director's agents, or any Independent Director's advisors  
6 relating in any way to the Independent Director's role as an  
7 Independent Director of Strand without the Court (1) first  
8 determining, after notice, that such claim or cause of action  
9 represents a colorable claim of willful misconduct or gross  
10 negligence against Independent Director, any Independent  
11 Director's agents, or any Independent Director's advisors; and  
12 (2) specifically authorizing such entity to bring such a  
13 claim. The Court will have sole jurisdiction to adjudicate  
14 any claim for which approval of the Court to commence or  
15 pursue has been granted."

16 This was both an exculpation from negligence as to the  
17 Independent Directors and their agents and advisors, as well  
18 as a gatekeeping provision. This Court believes that this  
19 provision basically approved an exculpation for the  
20 Independent Directors way back on January 9, 2020 for their  
21 postpetition conduct that might be negligent. And this is the  
22 law of the case and has *res judicata* preclusive effect now.

23 Thus, as to the three Independent Directors, as well as  
24 the other named parties in the January 9, 2020 order, their  
25 agents, their advisors, we have a situation that fits within

1       *Republic Supply v. Shoaf*, and we fit within the exception  
2       articulated in *Pacific Lumber*.

3              The Court reserves the right to supplement these findings  
4       and conclusions as to the exculpations, but based on the  
5       foregoing, they are approved and the objections are overruled.

6              Now, turning to the Plan objection, it appears at Article  
7       IX.F of the Plan and provides, in pertinent part, as follows:  
8       Upon entry of the confirmation order, all enjoined parties are  
9       and shall be permanently enjoined on and after the effective  
10      date from taking any action to interfere with the  
11      implementation or consummation of the Plan. Except as  
12      expressly provided in the Plan, the confirmation order, or a  
13      separate order of the Bankruptcy Court, all Enjoined Parties  
14      are and shall be permanently enjoined on and after the  
15      effective date, with respect to any claims and interests, from  
16      directly or indirectly -- and then commencing, conducting,  
17      continuing any suit, action, proceeding of any kind, and  
18      numerous other acts of that vein.

19              The injunction set forth herein shall extend to and apply  
20      to any act of the type set forth in any of the causes above  
21      against any successors to the Debtor, including but not  
22      limited to the Reorganized Debtor, the Litigation Sub-Trust,  
23      and the Claimant Trust, and their respective property and  
24      interests in property.

25              Plan injunctions like this are commonplace and

1 appropriate. They are entirely consistent with and  
2 permissible under Bankruptcy Code Sections 1123(a)(5),  
3 1123(a)(6), 1141(a) and (c), and 1142, as well as Bankruptcy  
4 Rule 3016(c), which articulates the form that a plan  
5 injunction must be set forth in a plan.

6 The Court finds the objections to the Plan Injunctions to  
7 be unfounded, and they are thus overruled without much  
8 discussion here.

9 Now, lastly, the Gatekeeper Provision. It appears at  
10 Paragraph 4 of Article IX.F of the Plan and provides, in  
11 pertinent part, "Subject in all respects to Article XII.D, no  
12 Enjoined Party may commence or pursue a claim or cause of  
13 action of any kind against any Protected Party that arose or  
14 arises from or is related to the Chapter 11 case, the  
15 negotiation of the Plan, the administration of the Plan, or  
16 property to be distributed under the Plan, the wind-down of  
17 the business of the Debtor or Reorganized Debtor, the  
18 administration of the Claimant Trust or the Litigation Sub-  
19 Trust, or the transactions in furtherance of the foregoing,  
20 without the Bankruptcy Court (1) first determining, after  
21 notice and a hearing, that such claim or cause of action  
22 represents a colorable claim of any kind, including but not  
23 limited to negligence, bad faith, criminal misconduct and  
24 willful misconduct, fraud, or gross negligence against a  
25 Protected Party; and (2) specifically authorizing such

1 Enjoined Party to bring such claim or cause of action against  
2 such Protected Party, provided, however, that the foregoing  
3 will not apply to a claim or cause of action against Strand or  
4 against any employee other than with respect to actions taken,  
5 respectively, by Strand or any such employee from the date of  
6 appointment of the Independent Directors through the effective  
7 date. The Bankruptcy Court will have sole and exclusive  
8 jurisdiction to determine whether a claim or cause of action  
9 is colorable and, only to the extent legally permissible and  
10 as provided for in Article XI, shall have jurisdiction to  
11 adjudicate the underlying colorable claim or cause of action."

12 This gatekeeper provision appears necessary and reasonable  
13 in light of the litigiousness of Mr. Dondero and his  
14 controlled entities that has been described at length herein.  
15 Provisions similar to this have been approved in this district  
16 in the *Pilgrim's Pride* case and the *CHC Helicopter* case. The  
17 provision is within the spirit of the Supreme Court's Barton  
18 Doctrine. And it appears consistent with the notion of a pre-  
19 filing injunction to deter vexatious litigants that has been  
20 approved by the Fifth Circuit in such cases as *Baum v. Blue*  
21 *Moon Ventures*, 513 F.3d 181, and in the *In re Carroll* case,  
22 850 F.3d 811, which arose out of a bankruptcy pre-filing  
23 injunction.

24 The Fifth Circuit, in fact, noted in the *Carroll* case that  
25 federal courts have authority to enjoin vexatious litigants

1 under the All Writs Act, 28 U.S.C. § 1651. And additionally,  
2 under the Bankruptcy Code, a bankruptcy court can issue any  
3 order, including a civil contempt order, necessary or  
4 appropriate to carry out the provisions of the Code, citing,  
5 of course, 105 of the Bankruptcy Code.

6 The Fifth Circuit stated that, when considering whether to  
7 enjoin future filings against a vexatious litigant, a  
8 bankruptcy court must consider the circumstances of the case,  
9 including four factors: (1) the party's history of  
10 litigation; in particular, whether he has filed vexatious,  
11 harassing, or duplicative lawsuits; (2) whether the party had  
12 a good faith basis for pursuing the litigation, or perhaps  
13 intended to harass; (3) the extent of the burden on the courts  
14 and other parties resulting from the party's filings; and (4)  
15 the adequacy of alternatives.

16 In the *Baum* case, the Fifth Circuit stated that the  
17 traditional standards for injunctive relief -- *i.e.*,  
18 irreparable harm and inadequate remedy at law -- do not apply  
19 to the issuance of an injunction against a vexatious litigant.

20 Here, although I have not been asked to declare Mr.  
21 Dondero and his affiliated entities as vexatious litigants *per*  
22 *se*, it is certainly not beyond the pale to find that his long  
23 history with regard to the major creditors in this case has  
24 strayed into that possible realm, and thus this Court is  
25 justified in approving this provision.

1       One of the Objectors' lawyers stated very eloquently in  
2 closing argument, in opposing the plan injunction and  
3 gatekeeping provisions, that "Even a serial killer has  
4 constitutional rights," suggesting that these provisions would  
5 deprive Mr. Dondero and his controlled entities of fundamental  
6 rights or due process somehow. But to paraphrase the district  
7 court in the *Carroll* case, no one, rich or poor, is entitled  
8 to abuse the judicial process. There exists no constitutional  
9 right of access to the courts to prosecute actions that are  
10 frivolous or malicious. The Plan injunction and gatekeeper  
11 provisions in Highland's plan simply set forth a way for this  
12 Court to use its tools, its inherent powers, to avoid abuse of  
13 the court system, protect the implementation of the Plan, and  
14 preempt the use of judicial time that properly could be used  
15 to consider the meritorious claims of other litigants.

16       Accordingly, the Objectors' objections to this provision  
17 are overruled.

18       As earlier stated, this Court reserves the right to alter  
19 or supplement this ruling in a written order. In this regard,  
20 the Court directs Debtor's counsel -- I hope you are still  
21 awake; it's been a long time -- the Court directs Debtor's  
22 counsel to submit a form of order. And specifically, I assume  
23 that you've already prepared or have been in the process of  
24 preparing a set of findings of fact, conclusions of law, and  
25 confirmation order that tracks the confirmation evidence and

1 recites conclusions of law that the Plan complies with all the  
2 various provisions of Section 1123, 1129, and other applicable  
3 Code provisions.

4       What I want you to do is take this bench ruling and add it  
5 to what you've prepared. And what I mean is, as you can tell,  
6 I've been reading: I will have my courtroom deputy email to  
7 you all a copy of what I just read. I'll have her obviously  
8 copy the Debtor's counsel, Creditors' Committee, Dondero and  
9 the other Objectors, copy them on this written document she's  
10 going to send out. And, again, I want you to kind of meld it  
11 into what you've already been preparing.

12       Obviously, I did not address in this oral ruling every  
13 provision of 1129(a) and (b). I did not address every 1123  
14 objection. I did not even address every single objection of  
15 the Objectors. But, again, any objection I've not  
16 specifically addressed today is overruled.

17       The briefing, I should say, that the Debtor submitted,  
18 there was a Memorandum of Law in Support of Confirmation filed  
19 on January 22nd. There was also a reply brief, a hundred  
20 pages or so, separately filed, replying to all the objections.  
21 I don't disagree with anything that was in that. So, again,  
22 to the extent you want to send me conclusions of law that are  
23 along the lines of that briefing, I would consider that.

24       And so what I thought is you'll send me the melded  
25 document and I will edit it if I see fit. I recognize this

1 may take a few days, so I don't give you a strict timetable,  
2 just hopefully it won't take too many days.

3 All right. Is there anyone out there -- Mr. Pomerantz,  
4 you had to go to jury duty, except I can't believe --

5 MR. POMERANTZ: No, I --

6 THE COURT: I can't believe you were called, but are  
7 you there?

8 MR. POMERANTZ: Your Honor, I am here. I was luckily  
9 excused, because I probably wouldn't have made it.

10 Your Honor, one just comment I'd make. You referred to  
11 the January 9th order. You didn't refer to the CEO order,  
12 which is your order July 16th, which had the same gatekeeper  
13 provision. I assume that was the same analysis?

14 THE COURT: That was an oversight. Same analysis.  
15 And that's exactly why I said I reserve the right to  
16 supplement or amend, because I know there had to be places  
17 like that where I omitted to mention something important.

18 MR. POMERANTZ: But thank you, Your Honor, for your  
19 thoughtful ruling, and we will certainly incorporate your  
20 materials into the order that we're working on and get it to  
21 you when we can. But we appreciate it on behalf of the  
22 Debtor. We know this took a lot of time and a lot of effort.  
23 Hopefully, you got a chance to still watch the Super Bowl  
24 yesterday.

25 THE COURT: Well, when I saw that Tom Brady was going

1 to win, I turned it off.

2 I'm sorry. That's terrible. You know, my law clerk, my  
3 law clerk that you can't see, Nate, he is from Ann Arbor,  
4 Michigan, University of Michigan, and he almost cried when I  
5 said I didn't like Tom Brady the other day. So, I apologize.

6 MR. POMERANTZ: Your Honor, one other comment. We  
7 had our motion to assume our nonresidential real property  
8 lease that was also on. It got missed in all the fanfare, but  
9 it was -- it has been unopposed and essentially done pursuant  
10 to stipulation. So we'd like to submit an order on that as  
11 well.

12 THE COURT: Okay. I have seen that, and I approve it  
13 under 365. You may submit the order. Okay. Thank you.

14 MR. POMERANTZ: Thank you, Your Honor.

15 THE CLERK: All rise.

16 (Proceedings concluded at 10:35 a.m.)

17 --oo--

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from  
22 the electronic sound recording of the proceedings in the  
above-entitled matter.

23 /s/ **Kathy Rehling**

02/09/2021

24 \_\_\_\_\_  
25 Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

\_\_\_\_\_ Date

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